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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1292

THEODORE KOEHLER, Warden,
Marquette Branch Prison,

Petitioner-Appellant,

vs.

ENOCH CHISM,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Patrick O. Landy
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Attorneys for Petitioner-Appellant

762 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1124

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The petitioner Theodore Koehler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 14, 1976.

OPINIONS BELOW

The following opinions are appended for the convenience of the court:

a. The Opinion of the Michigan Court of Appeals granting counsel. *People* v. *Chism*, 17 Mich App 196 (1969).

b. The Opinion of the Michigan Court of Appeals affirming the conviction. *People* v. *Chism*, 32 Mich App 610 (1973).

c. The Opinion of the Michigan Supreme Court affirming the conviction. *People* v. *Chism*, 390 Mich 104 (1973).

d. The Opinion of the United States District Court, Western District of Michigan, Northern Division, granting the writ of habeas corpus.

e. The Order of the United States Court of Appeals for the Sixth Circuit affirming the decision granting the writ of habeas corpus.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 14, 1976. This petition for certiorari is filed within 90 days of that date. Petitioner's Motion for Stay of the Mandate was granted by the Court of Appeals for the Sixth Circuit on February 10, 1976. This Court's jurisdiction is invoked under 28 USC 1254(i).

QUESTION PRESENTED

In determining that Enoch Chism had been denied the right to a speedy trial, did the Court of Appeals for the Sixth Circuit improperly apply the criteria enunciated in *Barker* v. *Wingo*, 407 US 514 (1972), by placing on the state of Michigan the burden of proving that the delay was not prejudicial to Chism's defense?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

Amendments, Article VI—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

(References are to the Appendix filed in the District Court and certified as part of the record unless otherwise indicated.)

Enoch D. Chism filed an application for a Writ of Habeas Corpus in the United States District Court for the Western District of Michigan alleging that he had been denied his Sixth Amendment right to a speedy trial in connection with his state conviction of First Degree Murder. Chism also alleged that certain evidence introduced at his trial was the result of an improper search and seizure.

The matter was heard by District Judge Ralph M. Freeman, who determined that Chism had been denied a speedy trial and ordered his discharge from custody. Judge Freeman denied Chism relief on the search and seizure issue.

Chism's conviction arose out of a murder committed on August 18, 1969, in Marshall, Michigan. On that date, Mrs.

Nola Puyear was killed at a restaurant owned by her and her husband, when a package addressed to her and delivered through the mails exploded as she attempted to open it.

Pieces of the paper in which the bomb had been wrapped were recovered, together with masking tape and metal fragments. The hand lettered address and the postmark "Marshall" were legible on the wrapper. Also found in the restaurant was a bottle of pills in a wrapper with handwriting on it, which had been received by Mrs. Puyear some months earlier. Analysis of the pills showed them to be lye, although the label indicated tranquilizers.

During the police investigation, various Marshall area residents, including Chism, were interviewed and handwriting samples were taken. Subsequently, on October 11, 1967, Chism was arrested and charged with first degree murder.

At the time of his arrest, both Chism and his wife gave a written consent to a search of their home. As a result of that search, a roll of masking tape, a red marking pencil and a "Fiske" battery were seized. These items were admitted at trial in conjunction with expert testimony that they had similarities to certain fragments found at the explosion site.

On the following day, October 12, 1967, two officers returned to the Chism home and requested a quantity of cancelled checks and a notebook, which had been seen during the search on the preceding day. Mrs. Chism consented and delivered the requested items. Together with the pre-arrest handwriting samples, these items were introduced at trial as evidence that the address labels on the bomb package and on the pill package were in Chism's handwriting.

On October 18, 1967, one week after his arrest, Chism asked for appointed counsel as an indigent. The trial court

conducted three hearings on Chism's request. At these hearings, testimony was taken from Chism, his wife, and an officer of a Savings & Loan Association. At the time of the alleged offense, Chism and his wife held real estate, as tenants by the entireties, with a market value of approximately $14,000, subject to a mortgage indebtedness of $2,000. Chism also owned, jointly with his wife, two automobiles worth about $3,200, and he was a joint tenant with his wife in thirty shares of stock worth approximately $3,100; he had title to a Honda motorcycle, which was actually a gift to their minor son and his wife had approximately $1,500 in cash in a savings account (12).

More than two years prior to the date of the alleged offense, Chism's wife had filed for a divorce. However, no property settlement had been executed nor negotiated between the parties at the time of Chism's arrest. Between the first and second hearings relating to Chism's ability to retain counsel at his own expense, he voluntarily conveyed any interest which he may have had in all of the above-described property to his wife, who refused to render any assistance to him in obtaining counsel (13-14).

On January 9, 1968, the trial court ruled against Chism's request for appointed counsel, but shortly thereafter did appoint counsel for the limited purpose of taking an interlocutory appeal on the question of Chism's right to appointed counsel. The trial court was concerned about such questions as what effect joint ownership of property has on the determination of indigency, what consideration should be given to a deliberate transfer of property interest while an individual stands charged with a crime, and what consideration should be given to an absolute refusal on the part of a husband and wife to use their joint assets to obtain the services of an attorney (15).

It should be noted that during the time these hearings were being conducted, counsel was appointed for the limited purpose of representing Chism at a preliminary examination which was held on November 16, 1967.

On February 10, 1968, the newly appointed appellate counsel filed an Application for Leave to Appeal to the Michigan Court of Appeals which was granted on March 29, 1968, together with an order allowing the Prosecuting Attorneys Association of Michigan to intervene as amicus curiae. By order of that same date the Michigan Court of Appeals also shortened by one-half the time allowed to all parties for the submission of their briefs. Upon the understanding that the Court would be unable to hear oral arguments until after its summer recess, all parties stipulated to submission on briefs. On July 1, 1968 Chism moved for an advancement on the Court of Appeals' calendar citing his incarceration. Although both the state and amicus stipulated to the grant of this motion, it was denied by order of the Court of Appeals on July 10, 1968.

During this period Chism, proceeding *pro per*, filed a motion in the trial court on June 20, 1968 seeking dismissal on speedy trial grounds. On November 13, 1968 the Michigan Court of Appeals announced that it was taking the interlocutory appeal under advisement. The Court filed an Opinion on April 23, 1969, finding the trial court to have been in error in refusing to grant the request for appointed counsel.

On April 26, 1969, the trial court appointed counsel for Chism and informed him that the matter could be brought on for a jury trial during the following month (May) or in August (19). The newly appointed counsel advised the court that there were certain pre-trial matters he wished to resolve and declined the Court's offer of an immediate trial date.

Several motions followed including a Motion to Quash Information for Denial of Speedy Trial, denied on August 18, 1969; a Motion to Authorize Defendant to Hire a Handwriting Expert at County Expense, granted on August 12, 1969; a Motion to Suppress certain evidence; a Motion that Additional Counsel Be Appointed to assist defense counsel, granted on September 15, 1969; and two motions by the prosecuting attorney to endorse additional witnesses (20-23).

On September 19, 1969, defense counsel announced that he was ready for trial and demanded an immediate trial date. Trial was then set for the October term. One of the prosecution motions, filed on August 20, 1969, involved the endorsement of an expert witness in neutron activation analysis. On October 1, 1969, the trial court filed a finding allowing the endorsement of the expert witness (18). On October 13, a formal Order was entered allowing such endorsement, and on October 15, 1969, Chism's attorneys filed a motion to employ an expert neutron activation analyst on his behalf together with a substitute motion to suppress the physical evidence seized at Chism's home on October 11, 1967, and a motion for a continuance (24). It should be noted, however, that defense counsel was aware at least as early as July 24, 1969 that the expert witness would be endorsed (25).

The defense motion to employ a scientific expert and the motion for a continuance were granted. The motion to suppress the physical evidence was denied on December 3, 1969.

On January 20, 1970, Chism's trial commenced before a jury, and on January 30, 1970 he was found guilty as charged of first degree murder. The conviction was affirmed by the Michigan Court of Appeals, 32 Mich App 610 (1973) and the Michigan Supreme Court, 390 Mich 104 (1973).

On March 22, 1974, Chism filed an Application for Writ of

Habeas Corpus in the United States District Court for the Western District of Michigan, and on April 18, 1975, the Honorable Ralph M. Freeman issued an Opinion holding that Chism had been denied his right to speedy trial (46).

On May 14, 1975, an Order was entered granting the Writ of Habeas Corpus and discharging Chims (67), and on the same date an Order was entered granting petitioner's Motion for a Stay of Execution pending appeal (69).

On January 14, 1976, the Court of Appeals for the Sixth Circuit affirmed the decision granting the Writ of Habeas Corpus. On February 10, 1976, an order was entered granting a stay of the issuance of the mandate for thirty days to enable Warden Koehler to file a petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND IS CLEARLY ERRONEOUS BECAUSE THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DID NOT CORRECTLY APPLY THE BALANCING TEST ESTABLISHED IN BARKER v. WINGO, 407 US 514 (1972).

The issue in this case is the proper application of the speedy trial standards established in *Barker* v. *Wingo*, 407 US 514, 92 S Ct 2182, 33 L Ed 2d 101 (1972). In that case four factors to be considered in analyzing a claimed denial of the right to a speedy trial were identified:

> "A balancing test necessarily compels courts to approach speedy trial on an *ad hoc* basis ° ° °. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 US at 530.

This Court went on to state at 533 that these factors must be considered in light of the relevant circumstances of the case at bar.

> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process."

It is petitioner's position that, in analyzing the facts of this case in light of the four criteria established in *Barker,* the Court of Appeals for the Sixth Circuit unjustifiably weighed the first three factors too heavily against the government and improperly assigned to the state the burden of establishing that Chism was not prejudiced in the preparation of his defense.

The right to a speedy trial is relative and must be evaluated in the light of the circumstances of the individual case. *United States* v. *Ewell,* 383 US 116, 86 S Ct 773, 15 L Ed 2d 625 (1966). Legitimate delays for lengthy periods of time cannot always be said to constitute a violation of the Sixth Amendment. *United States* v. *Ewell, supra; United States* v. *Capaldo,* 402 F2d 821, cert den 394 US 989, 89 S Ct 1476, 22 L Ed 2d 764 (1969); *United States* v. *Peacock,* 400 F2d 992, cert den 393 US 1040, 89 S Ct 665, 21 L Ed 2d 588 (1969); *United States* v. *Kaufman,* 393 F2d 172, cert den 393 US 1098, 89 S Ct 892, 21 L Ed 2d 789 (1969). In the instant case the delay to permit an interlocutory appeal to be initiated by Chism is certainly legitimate and consistent with the public's right to the correct and effective prosecution of criminal cases.

Ponzi v. *Fessenden*, 258 US 254, 42 S Ct 309, 66 L Ed 607 (1922).

Mr. Justice Brennan discussed governmental delay in his concurrence in *Dickey* v. *Florida*, 398 US 30, 51-52; 90 S Ct 1564, 26 L Ed 2d 26 (1970):

> "When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. *Pollard* v *United States, supra,* at 361, 1 L Ed 2d at 399. See also *United States* v *Provoo, supra.* The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interest protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy trial safeguard . . ."

An examination of the *Barker* criteria and the circumstances resulting in the delay in this case clearly reveals that the government did not intentionally act to delay the trial of Enoch Chism.

LENGTH OF DELAY

The total time between arrest and trial in this case amounted to twenty-seven months. While agreeing that this time lapse is sufficient to raise the issue, it should be noted that far longer delays have been held justified. In *Turner* v *Estelle*, 515 F2d 853 (CA 5, 1975), the Court of Appeals for the Fifth Circuit upheld a delay of four years and eight months in a robbery case, noting that ". . . by itself the length of the delay cannot justify overturning the conviction." 515 F2d at 856.

In *Barker* this Court upheld a delay of over five years in a murder case, pointing out that the length of delay which can be tolerated for a serious, complex charge is considerably greater than for an ordinary street crime.

The instant case involved a complex murder charge, and an interlocutory appeal, occasioned by the prisoner's deliberate transfer of all his property interests after his arrest, involving serious questions regarding his right to appointed counsel.

In any case, the length of the delay is clearly not so long as to do more than trigger further inquiry, and should not by itself weigh heavily against either party.

DEFENDANT'S ASSERTION OF HIS RIGHT

Approximately eight months after his arrest Chism proceeded *in pro per* with a Motion to Dismiss on speedy trial grounds. This motion was made during the time that his interlocutory appeal concerning his right to appointed counsel was pending. Approximately twenty months after arrest Chism, by counsel, again moved to quash for denial of a speedy trial (20).

While petitioner agrees, as did the Michigan Supreme Court,

390 Mich at 114, that Chism's *pro per* Motion to Dismiss may properly be considered as an assertion of his right to a speedy trial, the second motion, made on June 19, 1969, came at a time when his counsel had declined an immediate trial date. In fact, Chism's counsel did not announce that he was ready for trial and demand an immediate date until September 19, 1969 (22). This second motion should properly be considered as a motion to quash and not as a demand for a trial.

Furthermore, as the Fifth Circuit Court of Appeals noted in *United States* v *Shepherd*, 511 F2d 119 (CA 5, 1975) at 122, ". . . the frequency and strength of a petitioner's assertion of his right to a speedy trial is a crucial factor to be considered in the balancing test." See also *United States* v *Latimer*, 571 F2d 498 (CA 10, 1975).

Here Chism asserted his speedy trial right but once, by filing the *pro per* Motion to Dismiss or at best twice. Chism's action does little more than show his awareness of the right to a speedy trial, and can hardly be considered a vigorous and persistent demand.

REASON FOR DELAY

Of the twenty-seven months delay involved here, approximately twelve and one-half months were spent in the trial court and approximately fourteen and one-half months were consumed by the appeal which was originated by Chism.

Most of the approximately three months spent in the trial court prior to appeal was taken up by three hearings in the consideration of Chism's request for appointed counsel. Chism had voluntarily transferred his assets to his wife between the first and second hearings, and the wife, who had previously filed for divorce, refused to contribute to his defense.

On January 9, 1968, the trial court denied appointed trial counsel, and shortly thereafter appointed counsel for the limited purpose of appealing that decision.

At the time of his arrest Chism and his wife held assets in excess of $18,000 (15). Several important questions were presented by Chism's circumstances, and by his voluntary transfer of assets. The trial court was concerned with the effect of joint ownership of property, the deliberate transfer of assets, and the absolute refusal of both Chism and his wife to seek the services of an attorney (16).

There was no precedent to guide the trial judge in determining the crucial question of whether Chism was an indigent entitled to counsel paid for by the people. To appoint counsel whenever requested, out of fear that an interlocutory appeal from a denial of counsel would delay the trial, would be an injustice to the public and would violate the precept that the right to appointed counsel applies only to indigents. *Gideon* v. *Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 789 (1963).

The time taken by the Michigan Court of Appeals to decide the interlocutory appeal, while lengthy, should not weigh so heavily and completely against the state. Although neither the Michigan Court of Appeals nor the Michigan Supreme Court of Appeals nor the Michigan Supreme Court attempted to explain the delay, the words of Justice Levin in his concurring opinion in *People* v *Chism*, *supra*, are noteworthy:

> "Legitimate differences of opinion and judgment concerning questions of fact and law are bound to arise in the course of lawsuits. Appellate courts are established to resolve such differences.
>
> Whenever a trial judge errs in ruling on a question that arises before (as here), during or after the trial of a case

and the defendant seeks and obtains reversal on appeal and trial or a new trial follows, the delay in the commencement of the trial or the new trial is attributable, in a sense, to the ruling found on appeal to have been erroneous."

"Sometimes, albeit infrequently, the trial which ultimately results in a defendant's affirmed conviction occurs many years after the defendant's arrest because of delay attributable to mistrials or new trials granted by the trial judge or, as here, a successful appeal.

Lawyers, judges, trial and appellate, often differ. Such differences and the time required to resolve them through the time consuming appellate process does not deny a defendant a speedy trial." 390 Mich at 143.

As this Court noted in *Barker*:

> ". . . different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 US at 531.

The Fifth Circuit has also indicated that delays resulting from court action should be assigned little weight:

> "Under *Barker*, neutral factors causing the delay are to be weighed less heavily against the government than an attempt by the government to prejudice the defense by delay. It is undisputed that the delay in this case resulted from the action or inaction of the district court rather than from any action, much less misconduct, of the prosecution. We therefore assign little weight to this factor in assessing the Shepherds' claim." *Shepherd, supra,* at 122.

Clearly this is not a case where the prosecution deliberately sought to delay in hope of gaining an advantage over Chism. The delay in the appellate court must be considered as a relatively neutral factor, and certainly Chism's action in deliberately transferring his assets should have been considered in assigning responsibility for this delay.

The state was also assigned culpability for the three month continuance requested by Chism following the endorsement of a neutron activation analysis expert witness. Although the Order allowing endorsement of the expert was not entered until October 13, 1969, Chism's counsel was aware at least as early as July 24, 1969 that the expert would be a witness and contacted him to obtain information regarding materials he had written (25).

Furthermore, at the time Chism's counsel filed the motions for a continuance and for permission to employ his own expert, he also filed a motion to suppress certain evidence. Clearly, defense counsel was not surprised by the endorsement of the expert, and the continuance ostensibly required to seek his own expert could have been avoided had his request been made at an earlier date.

PREJUDICE TO THE DEFENDANT

This Court in *Barker* identified three interests which must be evaluated when considering prejudice to the defendant.

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect."

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 US at 532.

The most important of these criteria is prejudice to the defense. In this case Chism was incarcerated prior to trial and bail was unavailable due to the extreme amount of evidence against him and the hideous nature of the crime charged, and to that extent he suffered a certain degree of prejudice to his person. However, there is little, if any, indication in the record of undue anxiety on Chism's part or of repeated demands for a speedy trial.

The Michigan Supreme Court found in *People* v. *Chism, supra,* at 115, that:

> "There is no testimony relevant to prejudice to defendant's defense because of the length of the case such as loss of witnesses, etc.
>
> "In sum, defendant suffered considerable personal deprivation by long incarceration, but it cannot be said that his ability to defend himself was in any significant way prejudiced."

The lower federal courts which considered this case and assigned to the state the burden of proving that Chism was not prejudiced in preparing his defense relied on *United States* v. *Dyson*, 469 F2d 735 (CA5, 1972); *United States* v. *Macino*, 486 F2d 750 (CA 7, 1973); *United States* v. *Rucker*, 464 F2d 823 (CA DC, 1972); and *United States* v. *Perry*, 353 F Supp 1235 (DC, 1973). The people assert that this is not a correct

statement of the law and that the cases cited do not support the conclusion that a writ of habeas corpus must issue.

In *United States* v *Rucker, supra,* the Circuit Court of Appeals for the District of Columbia specifically discounted the possibility that the defendant was prejudiced in his ability to prepare his defense. Instead, the prejudice which the court found was the possibility that had defendant been tried earlier, he would have been able to serve his sentence concurrently with two other sentences which he was then serving. It is clear that this case does not support the proposition that the government bears the burden of showing that there was no impairment to presenting a defense upon a showing of unjustified delay.

In *United States* v *Perry, supra,* the District Court of the District of Columbia found, as a factual matter, that there was a "reasonable certainty of significant prejudice." *United States* v *Perry, supra* at 1240. The crime in that case was an ordinary street crime, not a charge of first degree murder. Furthermore, the court did not hold that the burden was on the government to show that defendant was not prejudiced in his defense; but, rather, that the government had the burden of justifying the delay.

In *United States* v *Macino, supra,* there was a 28 month delay. The government offered no explanation or justification whatsoever for the delay. The Court of Appeals for the Seventh Circuit found that the record clearly indicated actual prejudice to the defendants' ability to defend themselves. Although the Court did indicate that at some point prejudice is presumed to result from an inordinate delay in bringing a defendant to trial, in light of the court's finding of actual prejudice this language must be considered as dictum. Furthermore, at no point did the court indicate that the burden of showing that there was no prejudice to the defense was on the government.

In *United States* v *Dyson, supra,* the Fifth Circuit reiterated its holding in *Murray* v *Wainwright,* 450 F2d 465 (CA 5, 1971) that:

> "Where the delay is not only excessive but the result of inexcusable inaction or misconduct of the government, it is prima facie prejudice. . . .
>
> The burden then shifts to the government which must demonstrate that the defendant has not been prejudiced by the delay." *United States* v *Dyson, supra* at 741.

However, this language in *Dyson* must be considered dictum in view of the fact that the court remanded the case to permit the government to make a showing concerning the reasons for the delay, and indicated that their analysis might be greatly altered in the event the government could show cogent reasons. Further, the Court stated, at 741:

> "It is undisputed that the delay in the present case did not impair the defense, as such, of defendant Dyson."

For the foregoing reasons petitioner avers that the above-cited cases do not support the proposition that upon a showing of delay, and some showing by a criminal defendant that there is a reasonable possibility that the defense might be impaired, the burden then shifts to the state to show that there was, in fact, no prejudice to the defendant.

In *United States* v *Roemer,* 514 F2d 1377 (CA 2, 1975) the Court of Appeals for the Second Circuit held that a 56 month delay between indictment and trial did not violate the Sixth Amendment. The defendant argued that some degree of prejudice should be presumed, but the Court held that the balancing test in *Barker* v *Wingo,* 407 US 514 (1972) contemplates a showing of actual prejudice. In *Roemer,* the initial

delay resulted from the trial court's dismissal of the indictment and the resulting recourse to the appellate process.

In addition, the Court of Appeals for the District of Columbia Circuit in *United States* v. *Sarvis,* 523 F2d 1177 (CA DC, 1975) refused to find a Sixth Amendment violation in a forty-six month delay where a great portion of the delay was caused by the workings of the court system—including twenty-six months which were consumed on appeal. The Court found that although appellate delay must ultimately be considered the responsibility of the government, it is a neutral reason not to be accorded the heavy weight assigned to intentional delay.

In *Turner v Estelle, supra,* the Court of Appeals for the Fifth Circuit denied a petition for writ of habeas corpus involving a delay of four years and eight months on a robbery charge. The Court clearly indicated that where it is necessary to inquire into the factor of prejudice in assessing a speedy trial claim, the prisoner has the burden of establishing prejudice. Although the Court indicated that there may be circumstances in which the first three *Barker* criteria are so heavily in a prisoner's favor that no inquiry into prejudice is required, the conviction in *Turner* was upheld even though the petitioner asserted prejudice to his defense due to the death of two alibi witnesss and the destruction of certain records.

Furthermore, the Sixth Circuit Court of Appeals has previously indicated in *Trigg* v *State of Tennessee,* 507 F2d 949 (CA 6, 1974) and in *United States* v *Franks,* 511 F2d 25 (CA 6, 1975) that the burden of establishing prejudice properly belongs with the prisoner seeking the writ.

In addition, in *United States* v *Giacalone,* 477 F2d 1273 (CA 6, 1973) the Court of Appeals for the Sixth Circuit con-

sidered a Fifth Amendment claim that Giacalone had been denied due process by virtue of a pre-indictment delay of almost four years. The Court stated:

> "At the outset we point out that no evidence was offered before the District Court to show
>
> "any actual prejudice to the appellee's defense because of the delay, and there has been no allegation of any actual prejudice but only general conclusory statements alleging prejudice but without facts in support of that claim.
>
> ° ° °
>
> ". . . we find no evidence that such delay was for the purpose of harassment or to enable the Government to gain some tactical advantage over the appellee. It does not appear that there was in this case the 'prosecutorial gamesmanship' referred to by the Second Circuit in United States v Iannelli, 461 F.2d 483, 485 n. 2.
>
> Thus, we must accept the general rule that in the absence of a showing of intentional Government delay actual prejudice must be demonstrated in order to establish a violation of Fifth Amendment." (citation omitted) 477 F2d at 1276.

Petitioner asserts that there is no reason to establish a different standard in assessing a Sixth Amendment claim, and that the Court of Appeals for the Sixth Circuit did not follow its prior holdings and erred in assigning to the state the burden on the issue of prejudice.

Chism's claim of defense impairment is totally unsupported by the record. The alleged instances of loss of memory by Chism involved clearly collateral matters which were not

material to his defense (32-45). Although certain physical evidence had deteriorated at the time of trial, the record clearly discloses that Chism's counsel never sought an independent analysis of such evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and order entered in this case by the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Patrick O. Landy
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Attorneys for Petitioner-Appellant

Business Address:
762 Law Building
525 West Ottawa Street
Lansing, Michigan 48913

Telephone: (517) 373-1124

Dated: March 9, 1976.

PEOPLE v. CHISM

1. CONSTITUTIONAL LAW—DUE PROCESS—MURDER—RIGHTS OF DEFENDANT—RIGHT TO COUNSEL.

   No one charged with the crime of murder in this state, regardless of his resources, who demands assistance of counsel in his defense may be forced to trial *in propria persona*.

2. CONSTITUTIONAL LAW—DUE PROCESS—RIGHT TO COUNSEL—INDIGENCY—STANDARDS.

   It is impossible for an appellate court to lay down specific and intricate rules defining standards of indigency in each case.

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 November 13, 1968, at Grand Rapids. (Docket No. 5,068.) Decided April 23, 1969.

Enoch Chism was charged with first-degree murder, and was bound over for trial. Defendant petitioned for appointment of counsel. Petition denied. Defendant appeals. Reversed.

John M. Gereck, Prosecuting Attorney, for the people.

William R. Worth, for defendant.

Amicus Curiae: Prosecuting Attorneys Association of Michigan (by *James R. Ramsey,* Assistant Prosecuting Attorney, Ingham County).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 21 Am Jlr 2d, Criminal Law §§ 318–323.

BEFORE: HOLBROOK, P. J., and T. G. KAVANAGH* and MCINTYRE,** JJ.

McINTYRE, J. Defendant was arrested in connection with an explosion which caused the death of Nola Puyear. The court appointed counsel at public expense for the limited purpose of representation at the preliminary examination, without deciding defendant's right to counsel for trial. After preliminary examination, the defendant was bound over for trial on a charge of murder in the first degree and stood mute upon arraignment. Before arraignment, defendant requested the court to appoint an attorney to represent him at public expense and three formal hearings were held concerning whether the accused was financially unable to provide counsel for himself within the meaning of GCR 1963, 785.3(1). At these hearings testimony was taken from the defendant, his wife, and an officer of a savings and loan association. It developed that at the time of the alleged offense the defendant and his wife held real estate as tenants by the entireties with a market value of approximately $14,000, subject to a mortgage indebtedness of $2,000, and that he owned jointly with his wife two automobiles worth about $3,200, that he was a joint tenant with his wife in 30 shares of stock worth about $3,100, that he had title to a Honda motorcycle which was actually a gift to the minor son of the parties, and that the wife of the defendant had about $1,500, in cash in a savings account.

A divorce action had been filed by the defendant's wife well before the date of the alleged offense but

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* Thomas Giles Kavanagh, Justice of the Supreme Court, assigned to sit on the Court of Appeals from February 27, 1969, "until the work assigned has been completed" pursuant to Const 1963, art 6, § 4, and CLS 1961, § 600.225, as amended by PA 1966, No 10.

** Circuit Judge, sitting on the Court of Appeals by assignment.

little progress had been made towards the disposition of that cause.

Between the first hearing and the second hearing relating to the ability of defendant to retain counsel at his own expense, the defendant had conveyed whatever interest he may have had in all of the above-described property to his wife. The wife together with a notary public had brought the papers already prepared to the county jail, and defendant executed them there. At the second hearing it was established that the defendant's wife refused to contribute to his defense or seek counsel for him on the basis that all of the joint property which was now held in her own right as a *feme sole*, since she considered herself judicially separated from her husband, was necessary for the future support of her 14-year-old son. The defendant testified that he sought to retain counsel but was advised that he must have a $5,000 retainer fee which he was unable to provide, which his wife was unwilling to give him, and that he was therefore financially unable to provide counsel for his defense.

The court filed an extensive finding in which it was stated that the court had no reason to believe that the wife of the defendant would cooperate in any way in the hiring of an attorney for the defendant and that further hearing would develop no additional facts to clarify the position of the various parties. Obviously anticipating appeal the court seeks a guideline to determine such questions as what effect joint ownership of property has on the determination of indigency, what consideration should be given to a deliberate transfer of property interest while standing charged with a crime, and what consideration should be given to an absolute refusal on the part of a husband and wife to use their joint assets to obtain the services of an attorney. The findings of the court determined that the defendant was not an "indigent person", and denied the appointment of counsel at public expense.

Defendant appealed to this Court through counsel appointed at public expense for the purpose of perfecting this appeal. Briefs have been filed by the attorney for the defendant, the prosecuting attorney, and a brief *amicus curiae* was filed by the Prosecuting Attorneys Association of Michigan asking for the affirmance of the trial judge's finding.

At the outset, this Court must affirmatively declare that no one charged with the crime of murder in this State who demands counsel for assistance in his defense may be forced to trial *in propria persona*. We read Am VI of the amendments to the United States Constitution, made applicable to the various States by Am XIV, to mean exactly what it says. Questions relating to financial ability to provide counsel, effect of refusal of a spouse to cooperate in obtaining counsel, deliberate transfer of property to effect indigency, are all subsidiary to the prime principle, *i.e.*, one on trial for murder who wants a lawyer shall have one.

We need not go further than this, and we do not go further than this in the present opinion. It is not within the province of an appellate court, nay it would be impossible for an appellate court, to lay down specific and intricate rules defining standards of indigency in each case.

As this court stated in *People* v. *Rocha* (1968), 13 Mich App 596, 597:

"The problem presented by this appeal has been, is and will be one of the most recurrent and troublesome that the trial bench must face. Any attempt by this Court to furnish guide lines in this area would create more problems than it would solve. Each case is a separate problem, and adequate review is

only possible on an adequate record. Trial of a criminal defendant without counsel always entails risk."

Defendant Chism is at this moment financially unable to provide counsel for his defense. Whether this resulted from a deliberate transfer of property, his neglect to enforce an equitable property settlement with his wife in the pending divorce case, or his wife's unwillingness to cooperate in obtaining an attorney for his defense, are all beside the point. Testimony was taken under oath with regard to these matters and if perjury or fraud exists appropriate criminal penalties can be applied. If the county advances funds for defense and later discovers hidden assets certainly appropriate civil remedies exist. These are matters of consideration for the executive branch of the county government and not for the trial bench.

Reversed and remanded for action not inconsistent with this opinion.

All concurred.

PEOPLE *v.* CHISM

1. Criminal Law—Constitutional Law—Enforcement of Constitutional Right—Sacrifice of Right.

   A criminal defendant cannot be compelled to sacrifice one constitutional right to enforce another.

2. Criminal Law—Right to Speedy Trial—Delay of Trial—Appellate Process.

   The right to a speedy trial may be delayed if one of the parties invokes the appellate process or if the delay is caused by fixed rules of law.

3. Criminal Law—Right to Speedy Trial—Standards.

   The right to a speedy trial is necessarily relative, may be consistent with delays, and depends upon the circumstances of each case; the right to a speedy trial secures rights to the defendant, but does not preclude the orderly administration of justice.

4. Criminal Law—Right to Speedy Trial—Delayed Trial—Appeal and Error—Standard of Review.

   An appellate court in determining whether a delay in bringing the defendant to trial assumes constitutional proportions examines the circumstances closely to ascertain whether the delay was arbitrary, purposeful, oppressive, or vexatious.

References for Points in Headnotes

[1] 21 Am Jur 2d, Criminal Law § 48 *et seq.*
[2–8] 21 Am Jur 2d, Criminal Law § 251 *et seq.*
Waiver or loss of accused's right to speedy trial, 57 ALR2d 302.
Accused's right to speedy trial under Federal Constitution-Supreme Court cases, 21 L Ed 2d 905.
[9–12] 21 Am Jur 2d, Criminal Law §§ 298 *et seq.*, 324–326.
[13] 53 Am Jur, Trial § 513.
[14–19] 47 Am Jur, Searches and Seizures §§ 71, 72.
Authority to consent for another to search or seizure, 31 ALR 2d 1078.
[16] 47 Am Jur, Searches and Seizures § 52 *et seq.*
[20] 5 Am Jur 2d, Appeal and Error §§ 778, 781, 782.
[21] 5 Am Jur 2d, Appeal and Error § 803.

5. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—DELAYED TRIAL—APPELLATE PROCESS.

The appellate process when invoked by a defendant cannot be used by the defendant as a contention for a denial of speedy trial, especially where the appeal process results in the vindication of the defendant's claim.

6. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—DEMAND FOR TRIAL—MOTION TO DISMISS—IN PROPRIA PERSONA MOTIONS.

The requirement that a formal, record demand for trial must have been made to raise the denial of speedy trial issue on appeal was met where the defendant acting *in propria persona* made a motion for dismissal on the ground of denial of a speedy trial and where during a portion of proceedings, including the time the motion was made, defendant was without counsel.

7. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—DELAYED TRIAL—APPELLATE PROCESS—STATUTES—FAIR TRIAL.

A delay in bringing defendant to trial caused by the defendant's invoking the appellate process to vindicate his constitutional right to the assistance of counsel comes under the statutory exception that a delay is permissible if necessary to secure to the defendant a fair and impartial trial (MCLA § 768.1).

8. CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—DELAYED TRIAL—APPELLATE PROCESS.

A 27-month delay in bringing the defendant to trial was not arbitrary, purposeful, oppressive, or vexatious, and did not harm the defendant's cause so as to constitute a denial of the defendant's right to a speedy trial where 14 months of the delay were consumed by the defendant's invoking the appellate process in vindication of his right to the assistance of counsel and where the appellate court attempted to remove delay by shortening the time for filing of briefs to one-half the regular time.

9. CRIMINAL LAW—EVIDENCE—OTHER CRIMINAL ACTS—ADMISSIBILITY—PROSECUTOR'S BURDEN.

Evidence of prior acts of a criminal defendant may be relevant to a showing of motive for commission of the crime charged; the burden is on the prosecution to demonstrate to the trial judge the relevance of the proffered evidence (MCLA § 768.27).

10. CRIMINAL LAW—EVIDENCE—OTHER CRIMINAL ACTS—DISPOSITION TO CRIME—ADMISSIBILITY.

Evidence of other criminal acts of a defendant are admissible

to prove motive, intent, or plan in committing the crime charged, but is not admissible merely to show disposition to do a criminal act (MCLA § 768.27).

11. HOMICIDE—MURDER—EVIDENCE—OTHER CRIMINAL ACTS—ADMISSIBILITY—PLAN—MOTIVE.

Admission into evidence in defendant's trial for first-degree murder of a pill bottle containing lye tablets which had previously been mailed to the murder victim was not reversible error where the victim was killed when a package containing a bomb which had been mailed to her exploded because the evidence showed the motive, intent, or common plan to kill the deceased and to kill the deceased by sending some harmful substance through the mail (MCLA § 768.27).

12. HOMICIDE—MURDER—EVIDENCE—OTHER CRIMINAL ACTS—INTENT TO KILL—ADMISSIBILITY.

The admission by the defendant charged with first-degree murder to the obvious fact that the sending of a bottle of poisonous pills to the victim showed an intent to kill the murder victim did not preclude the prosecution from introducing proofs as to the element of intent where the defendant did not admit that the intent was his own.

13. CRIMINAL LAW—EVIDENCE—OTHER CRIMINAL ACTS—STATUTES—INSTRUCTIONS TO JURY—UNREQUESTED INSRUCTION—COURT'S DUTY.

Instructions to jury limiting consideration of evidence of the defendant's criminal acts introduced pursuant to the statute allowing the use of such evidence to show motive, intent, common scheme, or plan, need not be given unless the defendant requests them (MCLA § 768.27).

14. SEARCHES AND SEIZURES—CONSENT TO SEARCH—BURDEN OF PROOF.

The prosecution has the burden of showing by clear and positive evidence, at a hearing on a motion to suppress evidence seized in a search consented to by the defendant that the defendant's consent was unequivocal, specific, and freely and intelligently given.

15. SEARCHES AND SEIZURES—CONSENT TO SEARCH—VOLUNTARY CONSENT.

A consent to a search was unequivocally, specifically, and intelligently given where the defendant signed a consent form acknowledging that he had been informed of his right to not have a search made without a search warrant and of his

right to refuse to consent to a search and that the consent was given voluntarily, the prosecution stated that the police did not inform the defendant that they would get a warrant and make a search if consent was not given because they thought this would be considered coercion, and where the transcripts of the suppression hearing do not indicate that the defendant denied that his consent was freely and intelligently given.

16. SEARCHES AND SEIZURES—SEARCHES—POLICE OFFICERS' ENTERING HOME.

Police officers' entering a home and requesting certain documents from the occupant can hardly be considered anything but a search.

17. SEARCHES AND SEIZURES—CONSENT TO SEARCH—HOLDER OF PRIVILEGE.

The party who is charged with an offense is the one who has a right against unreasonable searches and seizures, and only he alone, not an outside party, can waive the right.

18. SEARCHES AND SEIZURES—CONSENT TO SEARCH—OUTSIDE PARTY'S CONSENT—EFFECT.

A consent to a search given by an outside party, who cannot waive the defendant's right against unreasonable searches and seizures, neither adds nor detracts from the search; the legality of the search depends upon circumstances directly related only to the holder of the right.

19. SEARCHES AND SEIZURES—CONSENT TO SEARCH—SEARCHES SUBSEQUENT TO CONSENT—LIMITATIONS.

A second search of the defendant's premises made two days after the day on which the defendant gave a valid consent to a search and the first search was made was unlawful and items seized during that second search were inadmissible where the consent form did not authorize a search "at any time", because a consent is not permission for the authorities to enter at will the premises in question any time after the consent has been given, and, because a consent does not mean the constitutional protection against unreasonable searches and seizures has been waived forever.

20. CRIMINAL LAW—CONSTITUTIONAL ERRORS—APPEAL AND ERROR—STANDARD OF REVIEW.

Every constitutional error is not necessarily harmful; the test

on appeal is whether the reviewing court believes that the error was harmless beyond a reasonable doubt.

21. CRIMINAL LAW—EVIDENCE—INADMISSIBLE EVIDENCE—HARMLESS ERROR.

The admission of a notebook and checkbook used for handwriting analysis to identify the defendant as the perpetrator of the charged offense was harmless error beyond a reasonable doubt even though the notebook and checkbook were obtained in an illegal search where the handwriting expert used, in addition to the notebook and checkbook, specimen writings of the defendant, defendant's boat registration form, and defendant's application for a driver's license to make the comparison and identification, and none of the latter evidence was contested as evidence.

Appeal from Calhoun, Creighton R. Coleman, J. Submitted Division 3 March 3, 1971, at Grand Rapids. (Docket No. 9278.) Decided April 22, 1971. Leave to appeal granted, 387 Mich 760.

Enoch Chism was convicted of murder in the first degree. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski*, Solicitor General, and *John M. Jereck*, Prosecuting Attorney, for the people.

William R. Worth, for defendant.

Before: FITZGERALD, P. J., and HOLBROOK and BRONSON, JJ.

FITZGERALD, P. J. Defendant appeals by right from a jury conviction and life sentence on a charge of murder in the first degree.[1]

On August 16, 1967, a package was mailed to the residence of Mrs. Paul Puyear in the city of Mar-

[1] MCLA § 750.316 (Stat Ann 1954 Rev § 28.548).

shall, Michigan. Due to standing instructions, the package was rerouted and delivered to the Puyears' business address, a restaurant called the Tasty Cafe.

Nola Puyear attempted to open the package and it exploded, killing her instantly and doing substantial damage to the Tasty Cafe. An investigation at the scene turned up the wrapper of the package with the address written in red on it, pieces of masking tape, and metal fragments from a "Fiske" battery. Also found at the scene was a pill bottle and its contents and wrapper. It appears that this pill bottle, with pills containing sodium hydroxide (lye), had been mailed to the deceased some months earlier. An examination of the reassembled bomb wrapper indicated that the package had been mailed in Marshall.

Subsequent investigation led to the arrest of defendant; a search of his home resulted in the seizure of masking tape, a "Fiske" battery, and a red pencil similar to that used to address the package. From a comparison of the handwriting of defendant and the handwriting on the package wrapper and the pill wrapper, there was expert testimony that the writing was done by one and the same person. There was also testimony to the effect that the defendant was desirous of buying the Tasty Cafe from the Puyears.

Chism testified, while denying that he sent the bomb or the pills, that he purchased dynamite in 1966.

Helpfully, the Court has been assisted by excellent briefs by both defendant and the people, setting forth the issues raised and furnishing cogent arguments for both sides. The issues will be considered *seriatim.*

I. *Was appellant denied his constitutional right to a speedy trial?*

Mainstay of defendant's appeal is that the delay from his arrest on October 11, 1967, to his trial on January 20–30, 1970, was such a denial of his constitutional right to a speedy trial that it requires the reversal of his conviction and his discharge. He argues that the fact that the delay was caused by his appeal of the lower court's denial of his petition for counsel does not excuse the delay, mainly because the state cannot require a defendant to sacrifice one constitutional right (speedy trial) to enforce another (assistance of counsel). Defendant also argues that his lack of a formal demand for trial does not cure the error because he was without counsel for most of that time.

In opposition, the people argue that it was defendant who caused the delay because he invoked the appellate process prior to trial. It is also pointed out that defendant never made the required formal motion for trial.

Defendant was arrested on October 11, 1967, according to the record. On October 18, 1967, defendant petitioned for the appointment of counsel as an indigent. On October 18 and 27, 1967, and December 26, 1967, the court heard testimony relative to his financial status. Prior to this, the court appointed counsel for the preliminary examination which was held on November 16, 1967. On January 9, 1968, the lower court entered its finding denying appointed counsel for the trial. A formal order to such effect was filed on January 12, 1968, and counsel was appointed for the appealing of this order on January 18, 1968. On February 10, 1968, the appointed counsel filed an application for leave to appeal with this Court.

Thereafter, on March 29, 1968, an order was entered granting leave to appeal, granting leave to intervene *amicus curiae* to the Prosecuting Attorneys Association of Michigan, and shortening the time for the filing of briefs to one-half the regular period.

On July 1, 1968, defendant filed a motion and stipulation to advance the hearing date which was denied by order on July 10, 1968. Oral argument before this Court was had on November 13, 1968, and an opinion was entered on April 23, 1969, reversing the lower court and granting appointed counsel. See *People* v. *Chism* (1969), 17 Mich App 196. On April 25, 1969, the lower court appointed counsel for defendant.

While this appeal was in progress, defendant filed *pro se* a motion to dismiss for denial of a speedy trial on June 20, 1968. On July 24, 1968, the prosecutor filed an answer to this motion which was served on defendant on August 19, 1968. A hearing was not held on this motion on April 10, 1969, and the dismissal motion was denied by order entered April 21, 1969.

In April, the lower court informed defendant that trial could be held in either May or August of 1969, but defendant wished to make some pretrial motions first. On June 19, 1969, this time through counsel, defendant made a motion to quash for a denial of speedy trial which was denied by order on August 18, 1969.

On September 19, 1969, defendant made a motion for immediate trial and the case was set for trial in October, 1969. A motion for a continuance was filed by defendant after additional witnesses, opposed by defendant, were indorsed. Finally, the case was tried January 20–30, 1970.

Thus, the record shows that there was a 27-month interval between arrest and trial (October 1967 to January 1970), and of this time 14 months were taken up in appeals to this Court (February 1968 to April 1969).

Defendant is correct in his contention that a defendant cannot be compelled to sacrifice one constitutional right to enforce another. *Simmons* v. *United States* (1968), 390 US 377 (88 S Ct 967, 19 L Ed 2d 1247); *People* v. *Marsh* (1968), 14 Mich App 518. However, neither of the above cases dealt with the instant fact situation. Indeed, it appears that this situation (loss of speedy trial due to invoking the appellate process) is one of first impression in Michigan, if not the country.

There is no doubt that the constitutional right to a speedy trial is guaranteed to citizens in state prosecutions through the Fourteenth Amendment to the United States Constitution. *Klopfer* v. *North Carolina* (1967), 386 US 213 (87 S Ct 988, 18 L Ed 2d 1); *Duncan* v. *Louisiana* (1968), 391 US 145 (88 S Ct 1444, 20 L Ed 2d 491). The right to a speedy trial is also guaranteed to Michigan citizens by MCLA § 768.1 (Stat Ann 1954 Rev § 28.1024).

However, the flaw in defendant's position, and which is dispositive of the issue, is the fact that the delay was caused by his repeated recourse to the appellate process.

It appears that the invoking of appellate machinery serves to modify the speedy trial right. In *People* v. *Den Uyl* (1948), 320 Mich 477, the Court, in granting a writ of mandamus requiring the conclusion, within 60 days, of a preliminary examination which had been continued eight times, said:

"One of the circumstances which will constitute good cause for delay, again within reasonable limits

of time, *is the taking of an appeal,* whether by the State or another party. See *People* v. *Grisea,* 63 Cal 345, and the annotation in 56 LRA 513, 519." 320 Mich 489. (Emphasis supplied.)

The Court in *Den Uyl, supra,* went on to say:

"It is sometimes said that a speedy trial means a trial regulated by fixed rules of law, *and that delay created by operation of those rules is not included in the meaning of the constitutional provision."* 320 Mich at 490. (Emphasis supplied.)

Thus, *Den Uyl, supra,* points out that the right to a speedy trial may be delayed if one of the parties invokes the appellate process, or if the delay is caused by fixed rules of law. Both of those criteria fit the facts here presented.

In a recent United States Supreme Court case, uncited by both parties, it was indicated that the initiation of appellate proceedings is good cause for resultant delay. In *Harrison* v. *United States* (1968), 392 US 219 (88 S Ct 2008, 20 L Ed 2d 1047), the Court reversed a conviction upon retrial because of the use of inadmissible testimony. It appears that one of the appellant's other contentions in that case was that he was denied a speedy trial because the original indictment was eight years old (see 20 L Ed 2d at 1698). The Court, in answering this contention in a footnote, said:

"Virtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the action of a petitioner or from the need to assume careful review of an unusually complex case." fn 4, 392 US at 221 (88 S Ct at 2009, 2010, 20 L Ed 2d at 1051).

The United States Supreme Court also said that the speedy trial contention had been properly re-

jected by the Court of Appeals, District of Columbia. In that case, *Harrison* v. *United States* (1967), 128 App DC 245, 248, 249 (387 F2d 203), the Court said:

"The contention that appellants' Sixth Amendment right to a speedy trial has not been respected is predicated broadly upon the six-year lapse between the homicide and the third trial, but for this purpose we cannot treat litigation spans in a vacuum. 'There is no touchstone of time which sets a fixed maximum period that automatically requires application of the Sixth Amendment and dismissal of the indictment.' Rather, '[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures right to a defendant. It does not preclude the rights of public justice.' So in determining whether the delay complained of assumes constitutional proportions, we examine the circumstances closely to ascertain whether it was 'arbitrary, purposeful, oppressive or vexatious.'

"The time necessarily consumed in unraveling complex issues whose ultimate resolution vindicates the rights of the accused can hardly be said to constitute purposeful or oppressive delay. We are accustomed to careful study of the questions presented to us, particularly where human life or liberty is at stake, and surely this case has tolerated no deviation. '[T]he essential ingredient is orderly expedition and not mere speed'; indeed, '[a] requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.' One has but to examine the comprehensive opinions the second appeal brought forth to appreciate the court's task and foresee the risk that unwarranted haste might have worked to appellants' disadvantage. And there is no hint that any subsequent phase of this case radiates any constitutional implication."

The United States Supreme Court then, by its language and its approval of the language of the District of Columbia Court of Appeals, though dealing with a retrial rather than a first trial, says that the appellate process, when invoked by the accused, cannot then be used by the accused as a contention for a denial of speedy trial. It appears that this is especially so when the appeal process results, as it did in the instant case, in the vindication of the claim of the accused.

It is the general rule in Michigan that a denial of speedy trial issue cannot be raised unless a formal, record demand for trial has been made. *People* v. *Miklovich* (1965), 375 Mich 536; *People* v. *Duncan* (1964), 373 Mich 650; *People* v. *Frazier* (1969), 16 Mich App 38. Although defendant made no formal motion for a speedy trial, he did, on June 20, 1968, make a motion for dismissal on the grounds of denial of speedy trial. It should be noted that at this time defendant was still without counsel and was thus acting *in propria persona*. It is difficult to maintain the position that this *in propria persona* motion by defendant was not sufficient to meet the demand requirement, especially in light of the fact that *People* v. *Duncan, supra,* and *Miklovich, supra,* were decided before *Duncan* v. *Louisiana, supra,* and *Klopfer* v. *North Carolina, supra* (*contra,* see *People* v. *Frazier, supra,* p 42).

MCLA § 768.1 (Stat Ann 1954 Rev § 28.1024) provides:

"The people of this state and persons charged with crime are entitled to and shall have a speedy trial and determination of all prosecutions and it is hereby made the duty of all public officers having duties to perform in any criminal case, to bring such case to a final determination *without delay*

except as may be necessary to secure to the accused a fair and impartial trial." (Emphasis supplied.)

In the instant case, the complained-of delay was "necessary to secure to the accused a fair and impartial trial", *i.e.*, to enable him to have the assistance of counsel. Thus, the delay in this case would very easily come under the exception in the statute.

The 27-month delay in the case at bar is lamentable. No one involved in the administration of criminal justice desires or advocates this length of delay, especially those concerned with the appellate process. However, it can hardly be said in the instant case that the delay was "arbitrary, purposeful, oppressive, or vexatious", *Harrison, supra,* especially in light of the fact that this Court shortened the time for filing of briefs to one-half the regular time (order of March 29, 1968). The time involved appears not to have exceeded justifiable bounds nor to have harmed defendant's cause.

II. *Was it error for the lower court to admit into evidence certain items that tended to indicate appellant had made a prior attempt on the life of the deceased?*

Defendant contends that it was reversible error for the trial court to admit into evidence a pill bottle and wrapper that had been sent to the deceased sometime before the bomb. The bottle contained pills made of lye. The handwriting on the label was identified as being that of defendant. The label provided "Transvex tablets for release of nervous tension, restlessness, and irritability". It could be said that the hope of the sender was that Mrs. Puyear would take the pills and thus be poisoned.

Defendant contends that it was error to admit this under the provisions of MCLA § 768.27 (Stat Ann 1954 Rev § 28.1050), because there was no question of motive or intent involved. Also, it is urged that the judge's failure to give limiting instructions to the jury concerning this evidence is reversible error, even though the judge was not requested to do so.

The people argue that the evidence was clearly admissible under the statute, contending that the defendant cannot preclude the prosecution from using the statute merely by admitting that motive or intent was not at issue. The people further contend that because defendant took the stand and denied his guilt all elements of the crime were in issue and therefore the evidence could be introduced under the statute to show intent, motive, scheme, and system.

The trial court admitted the evidence for proof of intent under the statute. The court reasoned, and quite logically so, that to allow a defendant to admit intent on the part of some party (not defendant) and thus be able to bar the evidence would make the statute rather nonsensical.

MCLA § 768.27 (Stat Ann 1954 Rev § 28.1050) provides:

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission

of another or prior or subsequent crime by the defendant."

In interpreting this statute, this Court said in *People* v. *Shaw* (1968), 9 Mich App 558:

"Evidence of prior acts of a criminal defendant may be relevant to a showing of motive for commission of the crime charged. The burden is upon the prosecution to demonstrate to the trial judge the relevance of the proffered evidence. *People* v. *Askar* (1967), 8 Mich App 95. Despite its relevancy it should be excluded where probative value is outweighed by attendant prejudice to the defendant. The assessment of the relative weight of these two factors is within the discretion of the court.

"Where intent or motive is material and relevant, the mere fact that the prior act is itself a crime does not render the evidence inadmissible. *People* v. *Allen* (1958), 351 Mich 535. Proof of motive is highly relevant in a case such as this where there are no eyewitnesses and the prosecution's case is necessarily a circumstantial one. Defendant's interests must be weighed heavily, however, where the motive is evidenced by criminal acts. The problem is most acute and the inflammatory tendency of such evidence most pronounced where the act is an alleged rape of decedent's wife by defendant. Such is the case here." 9 Mich App 566.

Additionally, although other acts may be introduced to show motive, intent, or plan, this statute cannot be used to introduce evidence that merely shows disposition to do a criminal act.

In *People* v. *Johnson* (1968), 13 Mich App 69, the defendant was convicted of murdering one of his fellow inmates in Jackson Prison. The prosecutor at trial introduced evidence of prior arguments, fights, and disturbances that defendant had been involved in. This Court said in reversing the case:

"The prosecutor's explanation before the trial court that such evidence was offered to show 'disposition toward violations' is equally untenable. In a trial for a criminal offense, evidence of other distinct offenses is generally inadmissible, unless tending to show 'motive, intent, the absence of, mistake or accident,' or, in sexual offenses, to show 'opportunity, disposition of the parties, and intimate relations tending to break down self respect.' *People* v. *Williams* (1965), 2 Mich App 91, 94. These exceptions are not applicable in a homicide case where the evidence of unrelated and dissimilar prior incidents is offered solely to prove defendant was more likely to have committed, or disposed toward the commission of, that offense for which he stands trial.

"Evidence of unrelated and collateral matters 'raises false issues and is likely to lead the jury to try the accused of what is not in the information.' *People* v. *Pinkerton* (1889), 79 Mich 110, 113. To compel defendant to answer such charges is to bring him to *trial on one charge and ask him to acquit himself on another*. See *People* v. *Wright* (1940), 294 Mich 20. Such conduct by the prosecutor, in this case, created a highly prejudicial atmosphere for the defendant. Prosecutor's arguments before the trial and before this Court justifying admission of the evidence are untenable." 13 Mich App 72.

Other cases have held that evidence of previous fights is not admissible under the statute where, unlike here, the charge is manslaughter and the defendant claims self defense. *People* v. *Matthews* (1969), 17 Mich App 48; *People* v. *Wright* (1940), 294 Mich 20.

In the instant case, the contested evidence was offered to show the design, plan, motive, intent, *etc.*, of the defendant on a charge of first-degree murder. It would seem to be reasonable under the

statute to show, by previous acts, that defendant intended or planned to kill the deceased by sending some form of harmful article to her through the mail.

Defendant argues that because intent was not in issue (the person who sent the package obviously intended to kill the deceased) the prosecutor should not be permitted to offer proofs under the statute to show intent. This argument has some defects. First, the fact that some of the elements are admitted does not preclude the prosecutor from introducing proofs as to those elements. *People* v. *Neaton* (1940), 294 Mich 134. Second, the intent in issue was the intent of the defendant, and he obviously did not admit that he had the intent to send the bomb. As the trial judge so succinctly pointed out, to permit the defendant to prohibit the people from introducing proofs as to intent merely by the defendant admitting that there was intent (but not his) would defeat the purpose of the statute.

It appears, then, that this issue really comes down to whether or not the prior attempt to kill the deceased showed a common plan, scheme, system, or intent or motive. There can be little argument but that poison pills in the mail has some relation to a bomb in the mail. Admission was not reversible error.

Defendant further argues that even if the evidence was properly admitted, it was reversible error for the lower court to fail to give specific instructions to the jury concerning the evidence. It does not appear that the defendant requested these instructions, and he also did not object to the instructions as given. Nevertheless, defendant argues that it was the duty of the trial judge to give the instructions even in the absence of a request, relying on *People* v. *Askar* (1967), 8 Mich App 95.

In *Askar, supra*, the defendant was charged with sodomy, not murder. This Court held that the statute was not applicable to sodomy prosecutions because motive, intent, scheme, or plan is not involved. Thus, that case did not really deal with the statute. The prior acts in *Askar, supra,* were admitted not under the statute but under the common-law exception which permits prior offenses to show opportunity, disposition of the parties, and intimate relations tending to break down self-respect in sexual offenses. It was for evidence of prior acts under the common-law rule that this Court required limiting instructions, even if not requested.

Additionally, recent cases in this Court have held that the failure to give unrequested limiting instructions concerning evidence admitted under the statute is not reversible error. *People* v. *Anderson* (1968), 13 Mich App 247; *People* v. *Stevens* (1970), 25 Mich App 181; *People* v. *Albert White* (1970), 27 Mich App 432.

III. *Was the seizure of evidence from appellant's home the result of an unreasonable search and seizure?*

Defendant argues that the consent search of his home was unlawful because, prior to the search, he was not warned of (1) his right to refuse access without a warrant and (2) the fact that a consent search is broader than a warrant search.

The prosecution states that the defendant was adequately warned of his rights, and that he intelligently, knowingly, and voluntarily waived his rights by signing a consent in the following form:

"I, Enoch D. Chism, having been informed of my constitutional right not to have a search made of

the premises hereinafter mentioned without a search warrant, and of my right to refuse to consent to such a search, hereby authorized M. L. Myers, Post Office Inspector, and Leroy Steinbacher, of the Mich State Police Dept, to conduct a complete search of my residence located at 15969 C Drive North & the curtilage & 1964 Ford Fairlane & 1965 Pontiac. The above named are authorized by me to take from my residence any letters, papers, materials or other property which they may desire.

"This written permission is being given by me to the above named voluntarily and without threats or promises of any kind."

Defendant made a pretrial motion to suppress the articles seized in the search (battery, masking tape and red pencil). At the hearing on the motion, it was established that the defendant was warned of his rights that anything found would be used against him as evidence, that defendant signed the consent without any deceit or trickery on the part of the investigators, and that he had been informed of his right to refuse to sign the consent.

The trial judge found that the search was lawful and the evidence was thus admitted.

The general rule is that the prosecutor has the burden of showing that the consent for a search given by the accused was unequivocal, specific, and freely and intelligently given. It must be proven by clear and positive evidence. *People* v. *Kaigler* (1962), 368 Mich 281; *People* v. *Shaw* (1970), 383 Mich 69.

In the instant case, defendant signed a consent form that said he had been informed of his constitutional right not to have a search made without a warrant and of his right to refuse to consent to the search, requirements set forth in *People* v. *Zeigler* (1960), 358 Mich 355.

In addition, the transcripts of the suppression hearings do not seem to indicate that defendant denied that his consent was freely and intelligently given.

In *People* v. *Shaw* (1970), 383 Mich 69, the Court reversed a murder conviction and remanded for a new trial because evidence was admitted where the consent was not shown by clear and positive evidence. There, unlike here, there was no signed consent form and there was only the testimony of one officer, which resulted in some contradictions. Here, there appears to be no question as to the consent being freely given.

In *People* v. *Kaigler* (1962), 368 Mich 281, the Court reversed and ordered a new trial because of a coerced consent search. However, in that case, the Court felt it of utmost significance that the police stated that they would search the home whether or not they got the keys from the defendant. The Court felt this was coercive. In the instant case, the prosecution says that the police did not inform defendant that if he didn't give his consent they would get a warrant and make the search anyway because this would be considered coercion, as in *Kaigler, supra.*

There is scant authority for defendant's contention that the police have to warn him of the fact that a consent search is broader than a warrant search. Further, as to the contention that he could refuse access without a warrant, the consent form defendant signed stated that he had been informed that he had a right to refuse a search absent a warrant.

The consent was unequivocal and specific, freely and intelligently given, and this was shown by clear and positive evidence. No error resulted.

IV. *Were the checks and notebooks seized by the officers in the second search a product of an unreasonable search and seizure?*

After the initial consent search of the defendant's home on October 11, 1967, the police returned to the house on October 13, 1967. At that time, they did not have a warrant. Defendant's wife admitted them to the house and the police informed her that they wished to have defendant's checkbook and notebook that they had seen during the previous search. Defendant's wife went into another room and returned with the items. The police then left and the two articles were used for handwriting analysis and admitted as exhibits 38 and 39.

Defendant argues that these items should not have been admitted because they were the fruits of an illegal search and seizure. The search, he claims, was defective because (1) the original consent could not be used for a subsequent search and (2) defendant's wife could not waive his right against unreasonable searches and seizures. The prosecution counters with the view that there was really no search, the officers merely went to the home and requested the articles. The prosecution contends that a wife can consent to the search of a place of which she is a joint user.

It is difficult to sustain the position that this in fact was not a search by the police officers. Police officers' *entering* a home and requesting certain documents from the occupant can hardly be considered anything but a search. See *Bumper* v. *North Carolina* (1968), 391 US 543 (88 S Ct 1788, 20 L Ed 2d 797).

As to the question of the consent given for the earlier search, and whether or not such consent remains in effect for subsequent searches, there is

little authority in Michigan. The United States Supreme Court has not yet definitively addressed this issue.

In *People* v. *Nawrocki* (1967), 6 Mich App 46,[1] this Court permitted a second search of an automobile in the afternoon, after it had previously been searched in the morning, basing the decision upon the fact that the appellant there had said the police could search his car "at any time". Additionally, there, unlike here, the automobile was parked in the police garage.

In *People* v. *Flowers* (1970), 23 Mich App 523, this Court held that a parent cannot waive by consent a minor's right to an unreasonable search and seizure, even if the minor is living at home and is being supported by the parent. The Court felt that the father there, as apparently is the wife here, was a third party or an outsider when considering the crime charged. It is the charged party who has the right and can waive it, not an outside party.

Michigan cases have also held that an attorney cannot waive the search privilege for his client, *People* v. *Kaigler* (1962), 368 Mich 281; and that the defendant's grandmother who owned the premises wherein defendant rented cannot waive the defendant's search privilege, *People* v. *Overall* (1967), 7 Mich App 153.

The wife's consent can be said to have neither added to nor detracted from the search. The legality of the search itself is the paramount concern. The consent originally executed by defendant is reproduced, *supra*.

Under the instant facts, and considering the traditional narrow interpretation given to consents obtained during custody, we decline to hold that the consent given by defendant for the search on

[1] *Cert den* 389 US 942 (88 S Ct 304, 19 L Ed 2d 296).

October 11, 1967, was sufficient to render constitutional the second search on October 13, 1967.

We have not found, nor have we been directed to, any authority that establishes a consent as permission for the authorities to enter at will the premises in question at any time thereafter. When consent is given to search an area, it does not mean the constitutional protection against unreasonable searches and seizures has been waived forever.

Indeed, we think there is a difference between a continuing or subsequent search on the same day as in *People* v. *Nawrocki* (1967), 6 Mich App 46, *cert den* 389 US 942 (88 S Ct 304, 19 L Ed 2d 296), and one on a subsequent day. Thus, the checkbook and notebook seized in the second search were improperly seized and not admissible as evidence. *Mapp* v. *Ohio* (1961), 367 US 643 (81 S Ct 1684, 6 L Ed 2d 1081, 84 ALR2d 933).

Notwithstanding the inadmissibility of the notebook and checkbook, the conviction does not fall. Every constitutional error is not necessarily harmful, the test being whether or not we believe the error was harmless beyond a reasonable doubt. *Chapman* v. *California* (1967), 386 US 18 (87 S Ct 824, 17 L Ed 2d 705).

The testimony of the handwriting expert clearly indicates that he used a number of other items in making the identification. In addition to the contested notebook and checkbook, the expert also used specimen writings of the defendant, the defendant's boat registration form, and the defendant's application for a driver's license to make the comparison and identification. None of the latter are contested as evidence.

We, therefore, hold that the admission of the notebook and checkbook was harmless error beyond a reasonable doubt as required by *Chapman, supra*.

In closing, we note that the entire record of this cause has been exhaustively reviewed, both in this case and in the prior opinion of this Court. No reversible error is found and accordingly the cause is affirmed.

All concurred.

PEOPLE v CHISM

OPINION OF THE COURT

1. CRIMINAL LAW—SPEEDY TRIAL—DELAY—PREJUDICE.

   A balancing test necessarily compels courts to approach speedy trial on an ad hoc basis and four factors are identified: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

2. CRIMINAL LAW—SPEEDY TRIAL—ATTORNEY AND CLIENT—APPEAL AND ERROR.

   Defendant had a right to appeal denial of his request for counsel as an indigent but time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial.

3. CRIMINAL LAW—SPEEDY TRIAL—MOTION TO DISMISS—MOTION TO QUASH.

   Defendant fulfilled his obligation to protect his right to speedy

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REFERENCES FOR POINTS IN HEADNOTES

[1, 5, 19] 21 Am Jur 2d, Criminal Law §§ 241, 242, 245–248.
[2] 21 Am Jur 2d, Criminal Law § 255.
[3] 21 Am Jur 2d, Criminal Law §§ 245, 252, 255, 256.
[4, 5] 21 Am Jur 2d, Criminal Law §§ 221, 234 *et seq.*
[6] 40 Am Jur 2d, Homicide §§ 282, 437, 439.
[7, 25] 29 Am Jur 2d, Evidence §§ 320, 324, 326.
53 Am Jur, Trial § 650.
[8] 47 Am Jur, Searches and Seizures §§ 16 *et seq.*, 31, 66.
[9–11] 47 Am Jur, Searches and Seizures § 71.
[10, 11] 29 Am Jur 2d, Evidence §§ 410–412, 425.
[12] 29 Am Jur 2d, Evidence § 415 *et seq.*
Federal Constitution as affecting admissibility of evidence obtained by illegal search and seizure. 84 ALR2d 959.
"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search. 43 ALR3d 385.
[13–18, 23] 47 Am Jur, Searches and Seizures §§ 6, 23.
Authority to consent for another to search or seizure. 31 ALR2d 1078.
[20] 4 Am Jur 2d, Appeal and Error § 160.
[21] 21 Am Jur 2d, Criminal Law §§ 255, 256.
[22] 47 Am Jur, Searches and Seizures § 40.
[24] 40 Am Jur 2d, Homicide §§ 315–319, 452, 565–567.

trial where he *pro per* moved to dismiss because of denial of a speedy trial approximately 8 months after arrest and he moved to quash for denial of speedy trial some 20 months after arrest and about 2 months after assignment of trial counsel.

4. CRIMINAL LAW—PREJUDICE—PRETRIAL INCARCERATION—WITNESSES.

There are two types of prejudice which a defendant in a criminal case may experience, prejudice to his person and prejudice to his defense; prejudice to his person would take the form of oppressive pretrial incarceration leading to anxiety and concern and prejudice to his defense might include key witnesses being unavailable.

5. HOMICIDE—TRIAL—FAIR TRIAL—DELAY—PRETRIAL INCARCERATION—DISMISSAL—PREJUDICE—APPEAL AND ERROR—EVIDENCE.

The processing of a first-degree murder case while not exemplary is not a case warranting dismissal where the case came to trial 27 months after arrest, approximately 14-1/2 months of that time was consumed upon an appeal by defendant from denial of appointed counsel; there was no evidence that a fair trial was jeopardized by delay, there was no undue prejudice because of presentence incarceration and no prejudice to his defense was brought into evidence.

6. HOMICIDE—MURDER—INTENT—MOTIVE—EVIDENCE—PRIOR ACTS—SEPARATE CRIME.

Murder involves intent; therefore, in a prosecution for murder, evidence that a bottle of pills containing a caustic substance had been mailed to the deceased victim and a piece of wrapping paper found on the shelf with the bottle which was on the bottle when it was received was admitted over defendant's objection and expert witnesses testified, over defendant's further objection, that in their opinion defendant's handwriting was on the wrappings on the bottle and on a bomb, which killed the victim, defendant by making bald admissions that someone intended to send the bottle through the mail could not shut out evidence by the prosecution that tended to show that defendant was the one who intended to do the act because intent was at issue and was a material and relevant element in the case; the act in sending the pills was admissible to show the intent to murder, and the trial judge did not err in allowing the pill bottle and wrapper into evidence for the purpose of establishing defendant's intention of doing away with the deceased since the motive or intent of a defendant may be shown by prior acts, even though they would constitute commission of another crime (MCLA 768.27).

7. CRIMINAL LAW—EVIDENCE—PRIOR CRIMES—MOTIVE—INTENT—INSTRUCTIONS—FAILURE TO OBJECT—APPEAL AND ERROR.

There is no absolute requirement that a trial judge give limiting instructions as to the admissibility of evidence of prior crimes admitted for the purpose of proving motive or intent, in the absence of request or proper objection; therefore, failure to instruct as to the limited admissibility of that evidence was not reversible error where there was no request for such instruction and no objection to the failure to instruct.

8. SEARCHES AND SEIZURES—SEARCH WARRANT—CONSTITUTIONAL LAW.

A warrantless search and seizure generally is unreasonable per se and violative of the United States and Michigan Constitutions (US Const, Am IV; Const 1963, art 1, § 11).

9. SEARCHES AND SEIZURES—SEARCH WARRANT—CONSENT—WAIVER—QUESTION OF FACT—EVIDENCE—INFERENCES.

Right to be secure from warrantless searches may be waived by defendant's valid consent and whether a consent is valid is a matter of fact based upon the evidence and all reasonable inferences to be drawn from it.

10. SEARCHES AND SEIZURES—CONSENT—DISCRETION.

Decision of trial judge, exercising his discretion, that consent to search defendant's residence, curtilage, and automobiles without a search warrant was valid and was not clearly erroneous where defendant was given the *Miranda* warnings informing him of his rights, he stated he understood these rights, his written consent verifies that he was informed of his "constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant" and of his "right to refuse to consent to a search", he was informed as to the purpose of the search and that the fruits thereof might be used against him in evidence, and the record was also replete with evidence that the consent was freely, voluntarily, and unequivocally given with no hint of coercion or duress.

11. SEARCHES AND SEIZURES—SEARCH WARRANT.

It is required that a defendant be informed that "he need not submit to a search"; a fine explanation of the role of search warrants is not required.

12. SEARCHES AND SEIZURES—COERCION.

A search and its fruits are illegal whatever the other circumstances are, if the search is coerced.

13. SEARCHES AND SEIZURES—LANDLORD AND TENANT—CONSENT—CONTRACTS.

An owner may not give consent to search premises of a tenant unless contractually provided for.

14. SEARCHES AND SEIZURES—CONSENT.

An owner may give consent to search of a room in a house which is commonly used and not the part of the house assigned to defendant, particularly if the object of the search is also commonly used.

15. SEARCHES AND SEIZURES—CONSENT.

The owner of a house may give consent to search a container jointly used by the owner and the defendant and left in the householder's house.

16. SEARCHES AND SEIZURES—HUSBAND AND WIFE—ASSUMPTION OF RISK.

Defendant "assumed the risk" that his wife would turn over particular items to the police where the wife was a joint owner of the house to be searched, a joint occupant as well as a joint owner of the bedroom where the objects seized were to be found and the checks to be seized were from a jointly handled checking account in the wife's name alone.

17. SEARCHES AND SEIZURES—CONSENT—HUSBAND AND WIFE.

Wife could give consent to search a jointly occupied and owned bedroom of a jointly owned house.

18. SEARCHES AND SEIZURES—HUSBAND AND WIFE—CONSENT—WAIVER—EVIDENCE.

Wife could and did consent to get items requested by police and deliver those items to them and her consent was freely, knowingly and voluntarily given where she had knowledge of the purpose of the search, she was not coerced in any way, she knew that her husband had signed a waiver to search the premises, she had joint use and control of the house which extended to the bedroom where the items were found, and there is no evidence that defendant exercised exclusive control or possession over those items seized.

CONCURRING OPINION

LEVIN, J.

19. CRIMINAL LAW—SPEEDY TRIAL—APPEAL AND ERROR.

Differences between lawyers, judges, trial and appellate, and the time required to resolve them through the time-consuming appellate process does not deny a defendant a speedy trial.

20. CRIMINAL LAW—APPEAL AND ERROR—COURT OF APPEALS—INTERLOCUTORY APPEALS—DISCRETION—ADVANCEMENT ON CALENDAR.

Defendant's motion for advancement of an interlocutory appeal on the calendar of the Court of Appeals in a criminal case should have been granted; however, that Court was not constitutionally obliged to hear during the summer recess the appeal which it granted defendant in the exercise of discretion.

21. CRIMINAL LAW—DELAY IN TRIAL—INTERLOCUTORY APPEALS—DISMISSAL OF PROSECUTION.

Delay in trial of a criminal case, while unfortunate, is not so unreasonable as would justify dismissal of the prosecution where the unjustified portion of the delay of perhaps four months was caused by an interlocutory appeal.

22. SEARCHES AND SEIZURES—AUTHORIZATION TO SEARCH.

There is no reason to read an authorization for a complete search as justifying but one visit to defendant's home, particularly where what was taken on the second visit was espied on the first visit and was seized within 30 hours after the authorization to search and seize was signed.

23. SEARCHES AND SEIZURES—CONSENT—CO-OWNER.

Authority of a co-owner to authorize a search of jointly-owned property should be limited to a case where the person giving the consent is himself under suspicion and so consents in an effort to exculpate himself.

24. HOMICIDE—MURDER—PRIOR ATTEMPTS—EVIDENCE—CIRCUMSTANTIAL EVIDENCE—IDENTIFICATION.

Evidence is admissible that tends to show a prior attempt to murder the victim by the person charged on the same principle as evidence that the person charged as the murderer has threatened the life of the victim clearly would be admissible in a case where it is sought to establish the identity of the murderer with circumstantial evidence.

25. CRIMINAL LAW—INSTRUCTIONS—PRIOR CRIMES—APPEAL AND ERROR—REQUEST FOR INSTRUCTION.

Failure to instruct on the limited purpose for which other crimes evidence is received is generally not error in the absence of a request to charge.

Appeal from Court of Appeals, Division 3, Fitz-

gerald, P. J., and Holbrook and Bronson, JJ., affirming Calhoun, Creighton R. Coleman, J. Submitted January 4, 1973. (No. 5 January Term 1973, Docket No. 53,409.) Decided October 17, 1973.

32 Mich App 610 affirmed.

Enoch D. Chism was convicted of first-degree murder. Defendant appealed to the Court of Appeals. Affirmed. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Stanley Everett,* Prosecuting Attorney, for the people.

Allen, Worth, Hatch & Calderone, for defendant.

Amicus Curiae: American Civil Liberties Union of Michigan (by *Joel M. Shere, Sheridan Holzman,* and *James K. Robinson).*

WILLIAMS, J. This case raises three issues:

1. unconstitutional denial of speedy trial;
2. admissibility of evidence of prior similar action under MCLA 768.27; MSA 28.1050; and
3. validity of particular search and seizures.

I. FACTS

Mrs. Nola Puyear was killed in the presence of her husband when a package addressed to her and delivered through the mails exploded as she attempted to open it. Investigation produced pieces of the wrapper containing the hand lettered address, masking tape and metal fragments identified as being from a "Fiske" type battery. The wrapper also disclosed a postmark "Marshall",

which testimony showed was a cancellation peculiar to Marshall, Michigan.

Search of the Puyear establishment also produced a bottle of pills and wrapper with handwriting on it. Mr. Puyear testified the pills had been received 6 to 12 months prior. Chemical analysis after Mrs. Puyear's death established the pills as lye although the label indicated tranquilizers.

To establish their case the police interviewed various Marshall area residents, collecting handwriting samples. Defendant was interviewed and gave handwriting samples. Subsequently he was arrested and charged with first-degree murder on October 11, 1967. After a "Miranda" warning he gave written consent to the search of his house as will more fully be discussed later. Defendant's wife also gave written consent to search the house. The search was made October 11, 1967. However, on October 12, 1967 officers returned to the house and requested and were given certain checks and a daily record book seen but not taken the day before.

Subsequent to arrest, defendant on October 18, 1967 requested appointment of counsel as an indigent. Such property as he had he had conveyed to his wife. Counsel was denied on January 9, 1968 and appeal therefrom was taken with counsel specially appointed for the appeal. It was not until April 23, 1969 that the Court of Appeals ruled that defendant was entitled to assigned counsel. In the meantime with specially assigned counsel defendant was given a preliminary hearing and bound over to stand trial for murder on November 16, 1967. The trial court was ready to commence trial promptly after the Court of Appeals ruled, but defendant's new counsel needed time and moved to quash for denial of speedy trial on June

19, 1969, as defendant had done *pro per* June 20, 1968. Thereafter the trial court denied the motion and on January 20, 1970, 27 months after arrest, the case came to trial. On January 30, 1970 defendant was convicted of murder in the first degree. Defendant appealed. The Court of Appeals affirmed. 32 Mich App 610; 189 NW2d 435 (1971). Defendant has been in jail since arrest.

II. SPEEDY TRIAL

The facts relating to a speedy trial are set out in full in Appendix A. It took the case 27 months to come to trial. However, the case was approximately 14-1/2 months on appeal so that the trial court actually had the case about 12-1/2 months.

The United States Supreme Court in *Barker v Wingo,* 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972) established a general rule applicable to *speedy trial* cases, which this Court has recognized as the definitive test in this area. *People v Grimmett,* 388 Mich 590, 602; 202 NW2d 278 (1972); *People v Collins,* 388 Mich 680, 688; 202 NW2d 769 (1972). The United States Supreme Court stated the rule as follows:

"A balancing test necessarily compels courts to approach speedy trial on an *ad hoc* basis. • • • Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 US 514, 530.

A. *Length of Delay*

As we said in *Collins:*

"The United States Supreme Court stated that: 'The length of delay is to some extent a triggering mecha-

nism. Until there is some delay which is presumptively prejudicial there is no necessity for inquiry into the other factors that go into the balance.' 407 US 514, 530. The Court noted that the delay which would provoke such an inquiry was necessarily dependent upon the 'peculiar circumstances of the case.'" 388 Mich 680, 688–689.

The total length of delay in this case is 27 months. Without appropriate explanation this is far too long. In *Collins* we said:

"The 15 months, including 7 months in jail is far in excess of the legislative 6-month standard and much too close to the 18-month rule of *Den Uyl.* It is unduly long unless the other factors require a different result." 388 Mich 680, 690.

B. *Reason for the Delay*

As the United States Supreme Court stated in *Barker,* "[t]he approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." 407 US 514, 530.

In assessing responsibility for the length of the case, it must be considered that of the 27 months duration 12-1/2 months was consumed in the trial court and 14-1/2 months on appeal originated by the defendant.

Of the 12-1/2 months spent in the trial court, a little over 3 months were spent before appeal and about 9 months after appeal. Most of the three months prior to appeal was spent in consideration of defendant's request for counsel as an indigent. The trial judge held hearings and then took the matter under consideration. The problem was that defendant had created his own indigency by voluntarily transferring his assets to his wife. She was separating from him and would not pay for his

lawyer. It is difficult to say that the time the trial judge took to rule adversely here materially affected defendant's rights.

Of the nine months in the trial court subsequent to the appellate decision allowing counsel, seven months were to meet defendant's and his counsel's convenience.

As a consequence it must be concluded that the time spent in trial court while deliberate was probably legitimate and the responsibility for the length of the largest portion of it was defendant's not the prosecution's or the trial court's.

Defendant certainly had a right to appeal but time reasonably consumed on appeal cannot be considered as in derogation of a speedy trial. *People v Den Uyl,* 320 Mich 477, 489–490; 31 NW2d 699 (1948). Both defendant and the prosecutor moved to accelerate the case, and the whole 14-1/2 months required by the Court of Appeals to dispose of this motion is hard to justify under the circumstances, particularly in light of that Court's abbreviating the time for filing briefs and motion to advance by defendant agreed in by the prosecutor. Consequently, it must be recognized that a part of the appeal time is indeed excessive and that this must be taken into consideration.

In considering the whole 27 months, however, between arrest and commencement of trial the major portion can be justified as necessary to process the case or to fit the defendant's convenience. There was some excess time taken on appeal.

C. *Defendant's Responsibility to Assert His Right*

The United States Supreme Court in *Barker v Wingo, supra,* stated:

"[D]efendant's assertion or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." 407 US 514, 528.

In the instant case, defendant *pro per* moved to dismiss because of denial of a speedy trial approximately eight months after arrest and while his assigned counsel for appeal of more than four months had his case on appeal. The trial court did not hear this motion until almost ten months had elapsed, partially because the matter was on appeal, although it was still on appeal when he decided the motion a few days later.

Some 20 months after arrest and about 2 months after assignment of trial counsel, defendant moved to quash for denial of speedy trial.

Defendant moved with reasonable dispatch all things being considered and raised his right to speedy trial once *pro per* and once promptly after receiving assigned counsel. It must be recognized that defendant fulfilled his obligation to protect his right to speedy trial.

D. *Prejudice to the Defendant*

There are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to his defense. Prejudice to his person would take the form of oppressive pretrial incarceration leading to anxiety and concern. Prejudice to his defense might include key witnesses being unavailable. Impairment of defense is the most serious, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker,* 407 US 514, 532.

Barker found no undue prejudice in ten months

incarceration. Defendant's 27 months incarceration certainly is too long unless otherwise justified.

There is no testimony relevant to prejudice to defendant's defense because of the length of the case such as loss of witnesses, etc.

In sum, defendant suffered considerable personal deprivation by long incarceration, but it cannot be said that his ability to defend himself was in any significant way prejudiced.

E. *Conclusion as to Speedy Trial*

In attempting to balance the four factors and give each its due, one begins with the 27 months from arrest to start of trial strongly triggering concern about denial of a speedy trial. However, analysis of what happened during those 27 months supplies a good reason for most of the time spent except for an uncomfortable feeling that the appeal period was over long. If the defendant is entitled to relief because of denial of speedy trial he certainly cannot be deprived of such relief for failure to assert his rights because he asserted them timely and vigorously. Finally, on the matter of prejudice to defendant because of the length of time before his trial, the most important thing is that there is no evidence that a fair trial was jeopardized by delay, although obviously 27 months of incarceration is not an insignificant personal hardship.

In weighing all of these factors together, it must be concluded that the length of the trial was in large part the necessary result of the defendant properly pursuing his legal procedures. Because of the nature of the crime and in absence of evidence to the contrary, it must be assumed that the defendant was not a bailable subject. The necessar-

ily protracted litigation and defendant's non-bailable condition account for the length of his presentence incarceration. So there is no undue prejudice there and no prejudice to his defense was brought into evidence.

This balancing of factors results in a long, but largely an explainably long case with explainable personal hardship due to incarceration but without prejudice to defendant's defense. Under these circumstances the processing of the case while not exemplary is not a case under *Barker v Wingo, supra,* warranting dismissal.

III. PRIOR SIMILAR ACTION

Defendant next claims that the failure of the trial court, in the absence of request, to give the jury a limiting instruction on the admission of two exhibits, a pill bottle containing lye pills and wrapper, that tended to indicate defendant made a prior attempt on the life of deceased, was reversible error.

Defendant's argument has two separate parts. First defendant argues that as motive and intent were not in issue, it was error to introduce evidence of prior acts under MCLA 768.27; MSA 28.1050[1] to show defendant's motive or intent. The second branch of the argument is that even if the evidence was admissible, the trial judge erred,

[1] MCLA 768.27; MSA 28.1050 provides:

"In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

even in the absence of request, in not instructing the jury as to the limited purpose for which such evidence was admissible.

A. *Was the Evidence Admissible under MCLA 768.27; MSA 28.1050?*

At the time of trial, the prosecutor offered as evidence Exhibits 14 and 15, being respectively a pill bottle labeled as tranquilizers though containing a caustic substance[2] which had been transmitted through the mail to the deceased, and a piece of wrapping paper found on the shelf with the bottle which was on the bottle at the time it was received.[3] The defendant raised objection to the admission of this evidence. The prosecution claimed that the evidence was to show intent, plan, and design. The trial judge ruled that it was admissible "under the statute having to do with defendant's mode of intent in the absence of mistake or accident". Over further objection of defendant, the expert witnesses for the prosecution testified that in their opinion the handwriting on the pill wrapper and the package wrapper that the

[2] Upon direct examination of a toxocologist, the prosecution asked him what the pills in the bottle contained.

"*A.* I made an analysis of the contents * * *, and being very caustic it appears it was sodium hydroxide.

* * *

"*Q.* I see. Is that sometimes referred to as lye?

"*A.* Yes."

[3] Though it was claimed by defendant that it is unclear as to whether the bottle came in this particular wrapper, there was conclusive testimony that this was in fact the wrapper. One patron of the restaurant testified that she had been present the day the pill package arrived and had seen deceased open it. She stated, "[I]t looks like the paper that was wrapped around a bottle of pills." Also, a policeman who gathered this evidence from the cafeteria after the explosion testified, after identifying the bottle and wrapper, that "[t]his is a small glass bottle which was contained within the brown paper wrapper that I located in the kitchen of the Tasty Cafe."

bomb was delivered in was the defendant's.[4] The Court of Appeals affirmed the trial court's ruling. They stated:

"It would seem to be reasonable under the statute to show, by previous acts, that defendant intended or planned to kill the deceased by sending some form of harmful article to her through the mail." 32 Mich App 610, 625–626.

The crux of defendant's argument was that since, admittedly, whoever sent the pills through the mail intended to do so, that no evidence to prove intention or motive was admissible. The trial court reasoned that to allow a defendant to admit intent on the part of some party (not defendant) and thus be able to bar the evidence would make the statute rather nonsensical.

The trial judge's conclusion has support in Michigan case law. In *People v Neaton,* 294 Mich 134, 142; 292 NW 589 (1940) this Court held:

"By the great weight of authority, the prosecuting attorney was not precluded from introducing evidence in the regular way to establish all the material facts and circumstances set forth in the information, and he is not precluded from so doing by any admissions made by defendant or his attorney."

Defendant by making bald admissions that someone intended to do the act could not shut out evidence by the prosecution that tended to show that defendant was the one who intended to do the act. Intent was in issue. Murder involves intent. *People v Giacalone,* 242 Mich 16; 217 NW 758 (1928). It was a material and relevant element in

[4] Both experts testified that the handwriting on the pill wrapper and package wrapper and other writing specimens of defendant matched. That is, they were all written by one and the same person.

the instant case. Thus the cases cited by defendant are inapposite.

The general proposition that the motive or intent of the defendant may be shown by prior acts, even though these acts would constitute commission of another crime is supported by numerous cases.[5]

The testimony of the handwriting experts linked defendant with the poison pills. That is, it was defendant's act in sending the pills. This act was then admissible to show the intent to murder.

We hold that the trial judge did not err in allowing the pill bottle and wrapper into evidence for the purposes of establishing defendant's intention of doing away with the deceased.

B. *Was it reversible error for the trial judge not to give a cautionary instruction as to the limited admissibility of the evidence where no such instruction was requested?*

Defendant claims that even if this evidence was admissible, it was reversible error for the trial judge not to limit its purpose and use, in the minds of the jury, to the question of intent.

However, defendant never requested a cautionary instruction, nor did he object to the instructions as given. He claims, nevertheless, that it was the duty of the trial judge to give a limiting instruction even in the absence of a request. He

[5] *See, for example: People v Nawrocki,* 376 Mich 252; 136 NW2d 922 (1965) (passing of other bad checks); *People v Allen,* 351 Mich 535; 88 NW2d 433 (1958) (proof of previous safe-breaking); *People v Johnston,* 328 Mich 213; 43 NW2d 334 (1950) (other acts of bribery and conspiracy); *People v Wright,* 315 Mich 81; 23 NW2d 213 (1946) (proof of previous holdup as evidence of intent to rob); *People v Fleish,* 306 Mich 8; 9 NW2d 905 (1943) (other instances of receiving stolen property).

cites the dicta of Judge O'HARA in *People v Kelly,* 26 Mich App 148; 182 NW2d 8 (1970).[6]

Our Court of Appeals has split on this issue even after the definitive Supreme Court ruling in *People v Nawrocki,* 376 Mich 252; 136 NW2d 922 (1965). See *People v Harper,* 39 Mich App 134, 137; 197 NW2d 338 (1972).[7] *Kelly* held that while it may be preferable for the trial judge to give an instruction at the time of the introduction of the evidence there is no reversible error if the judge includes such an instruction in the final charge.[8] But *Nawrocki* goes even further and holds that the trial judge is not required to give any limiting instruction *sua sponte.*

Here no instruction was ever requested by defendant nor did he offer objection to the final charge to the jury. As a result, no cautionary instruction was ever given. We hold that in the absence of request or proper objection under present Michigan case law, there is no absolute re-

[6] Judge O'HARA after discussing the other Court of Appeals cases stated:

"We hold failure in this case to give instruction *immediately* upon admission of the testimony was not reversible error. We hold not to give the instruction at all, whether requested or not, *is* reversible error." 26 Mich App 148, 159.

In the Supreme Court, *People v Kelly,* 386 Mich 330; 192 NW2d 494 (1971), Judge O'HARA's dicta was not repeated and the affirmation of the Court of Appeals with this dicta only noted there was a final covering instruction.

[7] For cases requiring instruction though no request see: *People v Askar,* 8 Mich App 95, 101; 153 NW2d 888 (1967); *People v Shaw,* 9 Mich App 558, 566; 157 NW2d 811 (1968); and *People v Canel,* 11 Mich App 219, 222; 160 NW2d 790 (1968).

For cases not requiring instruction if no request see: *People v Manchester,* 235 Mich 594, 595–596; 209 NW 815 (1926); *People v Anderson,* 13 Mich App 247, 250; 163 NW2d 793 (1968); *People v Mauch,* 23 Mich App 723, 728; 179 NW2d 184 (1970); *People v Stevens,* 25 Mich App 181, 183; 181 NW2d 31 (1970); *People v Albert White,* 27 Mich App 432, 434; 183 NW2d 606 (1970); and *People v McGath,* 31 Mich App 351, 359; 187 NW2d 904 (1971).

[8] The Supreme Court has under consideration a General Court Rule to cover this whole matter.

quirement that the trial judge give limiting instructions, even though such an instruction should have been given.

Therefore failure to instruct in this case where there was no request for such instruction and no objection to the failure to instruct was not reversible error.

IV. SEARCH AND SEIZURE

Defendant was arrested on October 11, 1967. On request by the police after arrest, he signed on the morning of that date a consent that his home be searched as follows:

"I, *Enoch D. Chism,* [Signed] having been informed of my constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant, and of my right to refuse to consent to such a search, hereby authorize M. L. Myers, Post Office Inspector, and Leroy Steinbacher, of the Michigan State Police Dept., to conduct a complete search of my residence located at 14969 C Drive North & the curtilage & 1964 Ford Fairlane & 1965 Pontiac. The above named are authorized by me to take from my residence any letters, papers, materials or other property which they may desire.

"This written permission is being given by me to the above named voluntarily and without threats or promises of any kind.

"(Signed) Enoch Chism"

Prior to signing the consent he was fully advised of his rights via the "Miranda" warning.[9] About 10

[9] "*Q.* And according to your best recollection, Mr. Wood, what was the defendant advised as to his Constitutional rights?

"*A.* He was told that of course, he was under arrest, that he had the right to remain silent, he had the right to have a lawyer present anytime that he was questioned, and if he could not afford a lawyer, a lawyer would be appointed to advise him. He was advised that anything that he might say could be used against him in any Court proceedings, and that he had the right to stop our asking questions at any time he chose."

Hearing on Suppression of Evidence September 18, 1969, p 4.

a.m. that morning his home was searched by a team of officers. Just prior to the commencement of the search the officers also obtained a written consent to search from defendant's wife.[10] They then found and removed a roll of masking tape, a red marking pencil, and a Fiske "C" battery.

On the next day, October 12, 1967, at about 4 p.m., two police officers returned to the defendant's home and requested that defendant's wife turn over to them certain cancelled checks of defendant and his daily record book. They had no search warrant. These items had been discovered the day before in the search but were not seized. Mrs. Chism produced and delivered the items without comment.

A motion to suppress the fruits of these searches was denied December 10, 1969. The defendant raises the following several related arguments as to both of these incidents.

A. *Validity of Defendant's October 11 Consent*

Defendant argues that his consent was ineffectual, even though the Miranda warnings were given, because he was not advised that a search could not be made without his consent unless a warrant was issued, that an impartial magistrate must issue the warrant, and of the difference in scope between a warrant search and a consent search.

Generally speaking, a warrantless search and

[10] "10-11-67

"I Bernice Chism give my permission to Sgt Fred L Ritchie and other law enforcement officers to search my house located at 14969 C Drive N. Also my Vehicle 1965 Pontiac license # PR4839.

"Bernice Chism" [Signed]

seizure is unreasonable per se and violative of the Fourth Amendment of the United States Constitution and 1963 Const, art 1, § 11 of the state constitution.

However, it is quite clear that the right to be secure from warrantless searches may be waived by defendant's valid consent. *Martucci v Detroit Commissioner of Police,* 322 Mich 270; 33 NW2d 789 (1948). We said in *People v Kaigler,* 368 Mich 281, 294; 118 NW2d 406 (1962):

"[S]uch waiver or consent must be proved by clear and positive testimony *and there must be no duress or coercion, actual or implied, and the prosecutor must show a consent that is unequivocal and specific, freely and intelligently given."* (Emphasis in original case.)

Whether a consent is valid is a matter of fact based upon the evidence and all reasonable inferences to be drawn from it.[11] The trial judge, exercising his discretion, found that the consent was valid. We hold that his decision was not clearly erroneous.

In *People v Zeigler,* 358 Mich 355, 364–365; 100 NW2d 456 (1960) this Court stated:

"And so, with respect to incriminating evidence, other than confessions, obtained by search and seizure, under a conceivable showing of facts, such as, *inter alia,* that the accused was first advised of his rights, informed that he need not submit to a search and that, if he did, the fruits thereof would be used in evidence against him, his consenting to the search and seizure may well, in the absence of contrary indications, be held to be voluntary, not an involuntary act secured under coercion, and, hence, a waiver of his constitutional rights, rendering such evidence admissible."

[11] Mascolo, *Inter-Spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach,* 40 Conn BJ 351, 357 (1966).

As stated above, the defendant was given the Miranda warnings informing him of his rights. He stated that he understood these rights.[12]

Further, the written consent verifies that defendant was informed of his "constitutional right not to have a search made of the premises hereinafter mentioned without a search warrant" and of his "right to refuse to consent to a search."[13]

Defendant was informed as to the purpose of the search and that the fruits of the search might be used against him in evidence.[14] The record is also replete with evidence that the consent was freely, voluntarily, and unequivocally given with no hint of coercion or duress.[15]

[12] Hearing on Motion to Suppress, September 18, 1969, p 4–5.

[13] Though the record shows that the defendant was not informed of the role of a search warrant, he was made fully aware by the prosecutor that he did not have to consent to the search and that he had every right to refuse if he was so inclined. Hearing on Suppression of Evidence, September 18, 1969, p 133.

All *Zeigler* requires is that the defendant be informed that "he need not submit to a search". It does not require a fine explanation of the role of search warrants. See *Consent Searches: A Reappraisal after Miranda v. Arizona,* 67 Colum L Rev 130, 132, fn 14 (1967).

[14] In response to a prosecution question to a police officer as to what defendant had been advised of the officer replied:

"As I recall, you [the prosecutor] advised him that anything that was found as a result of this search would be used against him in evidence, and he consented. He said he had nothing to hide from anybody, * * *." Final Hearing on Motion to Suppress, November 13, 1969, p 5.

"*Q.* Did you tell him why [you wanted to go out and search his home]?

"*A.* Yes.

"*Q.* What reason did you give him?

"*A.* We told him we wanted to look for items that could be used in construction of a device.

"*Q.* And his response was what?

"*A.* He had nothing to hide.

* * *

"*Q.* You made no mention of looking for any handwriting?

"*A.* Not as I recall, no sir."

Final Hearing on Motion to Suppress, pp 9, 11.

[15] The following questions and answers depict a scene free from coercion:

As to this first search, the wife's consent was

"*A.* We offered him coffee * * * , and he refused.

* * *

"*Q.* Was the defendant handcuffed?
"*A.* Not when we interrogated, no sir, interviewed him.
"*Q.* Were any weapons displayed?
"*A.* No sir.

* * *

"*Q.* Do you know of any deceit or trickery practiced on the defendant to get his consent?
"*A.* No sir."

* * *

Final Hearing on Motion to Suppress, pp 8, 13.
"*Q.* Did this conversation take place in a cell or where?
"*A.* It took place at where I believe is set aside as the Sheriff's living quarters in the Second Floor of the County jail.

* * *

"*Q.* Was any law enforcement officer in uniform present?
"*A.* No, sir.
"*Q.* What did you ask defendant specifically, whether you could go out to his home and search the premises?
"*A.* Yes, we did.
"*Q.* How many times did you ask him?
"*A.* We asked him once.
"*Q.* Do you remember what his response was?
"*A.* His response was that we certainly could; he had nothing to hide.

* * *

"*Q.* Do you recall what his response was at the time when you asked him, 'Would you talk to us about it?'
"*A.* He said he would talk to us about it, yes.
"*Q.* Did you proceed to discuss the various aspects as known to the police to Mr. Chism?
"*A.* Yes.
"*Q.* Did Mr. Chism at that time respond to the questions?
"*A.* Yes, sir.
"*Q.* Did he have any difficulty in responding to the questions?
"*A.* No.
"*Q.* Did he accept the questions and answer them freely and voluntarily?
"*A.* Yes, sir.
"*Q.* Did Mr. Chism at any time by word or deed or anything, or any expression, indicate he was being coerced in any manner?
"*A.* No, sir.
"*Q.* Was he crying?
"*A.* No.

irrelevant due to the valid consent of the defendant and we need not pass upon its validity. Thus the consent was valid and the evidence seized on October 11, 1967 was admissible.[16] The trial judge committed no error.

B. *Validity of the October 12 Seizure of the Checks and Notebook*

1. Did the defendant's valid consent of October 11 carry over to authorize the seizure on October 12?

On October 12, 1967, Fred Ritchie of the Calhoun County Sheriff Department and Detective Leroy Steinbacher of the Michigan State Police returned to the Chism home. Mrs. Chism was at

"*Q.* Did he show any signs of emotional symptoms?
"*A.* None, except he appeared to be somewhat nervous.
"*Q.* Was he extremely excited?
"*A.* No, sir."
Hearing on Motion to Suppress, September 18, 1969, pp 132–136.
And also when defendant testified at trial he portrayed a coercion free atmosphere:
"*Q.* While I am on that line of questioning, Mr. Chism, I show you Exhibit 37, did you sign that voluntarily?
"*A.* Yes sir, they asked me could they search my home and car, they said it would be necessary for me to sign this paper for those officers in my presence to search my home.
"*Q.* So you voluntarily consented to that, signed that authorization?
"*A.* I signed it authorizing the people in my presence to search my home. I didn't authorize the State of Michigan to go through my home.
"*Q.* What do you mean by that?
"*A.* These officers seemed like they were awful, pretty nice people, they asked me could they search my home, I said I didn't care if they searched my home."

[16] For a textual treatment of the law of consent to searches and seizures see:
Tiffany, McIntyre, and Rotenberg, *Detection of Crime: Stopping & Questioning—Search & Seizure—Encouragement & Entrapment* (Little, Brown, and Co ed 1967), ch 10, pp 156–170; and Varon, *Searches, Seizures & Immunities* (Bobbs-Merrill ed 1961), ch 4, pp 226, 232 *et seq.* and ch 8, pp 414, 429–450.

home and admitted the officers into the house. They told Mrs. Chism that there was a notebook of defendant's and some of his cancelled checks that they would like to have. They told her these items were in the bedroom. (On the previous day's search one of the officers had found a notebook of defendant's and some of his cancelled checks in the bedroom in a drawer but had failed to seize them. The officer then informed Officer Ritchie of this fact after they had left the house.) Officer Ritchie then asked if Mrs. Chism would get those specific items and turn them over. Mrs. Chism then left the room and returned with the items to the waiting officers."

The Court of Appeals declined to hold that the consent given by defendant for the October 11 search was sufficient to render constitutional the seizure the following day. It stated:

> "When consent is given to search an area, it does not mean the constitutional protection against unreasonable searches and seizures has been waived forever.
>
> "Indeed, we think there is a difference between a continuing or subsequent search on the same day as in *People v Nawrocki* (1967), 6 Mich App 46 [150 NW2d 516], *cert den* 389 US 942 (88 S Ct 304, 19 L Ed 2d 296 [1967]), and one on a subsequent day. Thus, the checkbook and notebook seized in the second search were improperly seized and not admissible as evidence. *Mapp v Ohio* (1961), 367 US 643 (81 S Ct 1684, 6 L Ed 2d 1081, 84 ALR2d 933)." 32 Mich App 610, 632.

In deciding whether this second seizure resulted in admissible evidence, the actual scope of the written consent must be determined. The consent, freely and voluntarily made by defendant, authorized Detective Leroy Steinbacher of the Michigan

[17] Hearing on Suppression of Evidence, September 18, 1969, pp 19, 24-28, 97-98.

State Police and the Postal Inspector M. L. Myers "to conduct a complete search of my residence • • • to take from my residence any letters, papers, materials or other property which they may desire."

Although defendant was not informed that handwriting samples would be looked for, he was informed that anything found as a result of the search would be used against him in evidence. Defendant's reply to this was that he had nothing to hide. Thus the officers went to the house on October 11 with the purpose of finding something that would be pertinent to the crime.

Therefore the consent was broad in the sense that it "authorized a complete search • • • of any • • • property." The items seized on October 12 had been found in the search on October 11 and could have then been seized. There was no general search on October 12 as the officers knew where the items were to be found. The officers were merely completing the search which had begun on the previous day. The defendant's consent, under these narrow facts, might be construed to be broad enough to authorize the seizure on October 12, but it is unnecessary for this Court to so hold, because it is clear that the wife had the power to consent to, and did consent to, the second search.

2. Could defendant's wife consent to the seizure of October 12?

When the officers returned on October 12, they asked the wife if she would get the checks and the notebook which had been seen on the previous day's search in the bedroom. She did so with little or no conversation with the officers.

Defendant argues that his wife could not waive

his rights by delivering the specified items to the police officers. The Court of Appeals did not base their decision of the seizure issue on the wife's consent.[18] Following *People v Flowers,* 23 Mich App 523; 179 NW2d 56 (1970) the Court of Appeals stated in dicta that the wife was an outsider and could not waive the right of a charged party. 32 Mich 610, 631.

There is no Michigan case directly in point. In *People v Weaver,* 241 Mich 616; 217 NW 797 (1928), the question was whether the constitutional right of the defendant wife to immunity from the unreasonable search of her home, one owned by her, may be waived by her husband. In holding that the evidence obtained in the search should have been suppressed, the Court stated:

"Defendant [wife] owned this property, was there conducting a boarding and rooming house, and, so far as this record discloses, was supporting herself. * * * To hold that the waiver signed by her husband nearly two years before prevents her from here asserting her constitutional rights would place such rights into the care and keeping of the husbands of all the married women of the state." 241 Mich 616, 623.

In *People v Azukauckas,* 241 Mich 182; 216 NW 408 (1927) the question was whether defendant, a bootlegger, could object to a warrant where the householder to whom liquor had been delivered as part of a sale did not. Certain Court of Appeals cases relied on by defendant will be considered later. Both of these cases are distinguishable on the facts from the instant case.

Authority in other states is widely split on the question of whether a wife can consent to a search

[18] The Court of Appeals stated:

"The wife's consent can be said to have neither added to nor detracted from the search." 32 Mich App 610, 631.

of the husband's premises and a seizure of his property.[19]

The United States Supreme Court has not yet passed on this particular question. In *Amos v United States,* 255 US 313, 317; 41 S Ct 266; 65 L Ed 654 (1921), the Supreme Court held that a wife could not consent to a search of her husband's premises when the consent was a product of coercion. It stated:

"We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."[20]

An additional highly relevant factor in this case is that at the time of the search and seizure, the defendant and his wife owned the property jointly.[21] This leads to the question of whether persons with at least equal interests in the premises or property with the one asserting the constitutional immunity against unreasonable searches and seizures may consent to a search of such premises or property notwithstanding the husband-wife relationship.[22]

[19] *See* 31 ALR2d 1078, 1091. *See also* Hall, Kamisar, LaFave and Israel, *Modern Criminal Procedure* (West ed 1969), ch 5, pp 295–296; Mascolo, *Inter-Spousal Consent to Unreasonable Searches & Seizures: A Constitutional Approach,* 40 Conn BJ 351 (1966); and Varon, *supra,* pp 430–432.

[20] *See People v Kaigler,* 368 Mich 281; 118 NW2d 406 (1962) for a situation involving explicit coercion.

[21] "*Q.* Do you own any real estate?

"*A.* Her and I own it together."

Hearing on Appointment of Counsel, October 18, 1967, p 4.

A similar exchange took place at a second appointment of counsel hearing on October 27, 1967. The exchange, at p 5, proceeded:

"*Q.* Now, how did you own the property in question?

* * *

"*A.* We owned it jointly."

[22] Several jurisdictions have allowed persons to consent to searches

There are four recent cases in which the United

of property or premises which they owned or had equal rights in as to use or occupation. See 31 ALR2d 1079, 1080, 1086.

ARKANSAS	*Maxwell v State*, 236 Ark 694; 370 SW2d 113 (1963). (Held that a parent could consent to a search of the premises owned by him even if the search resulted in the seizure of incriminating evidence as to their children.)
COLORADO	*Spencer v People*, 163 Colo 182; 429 P2d 266 (1967). (Owner of the premises may consent to a search of defendant roomer's bedroom.)
DELAWARE	*Jenkins v State*, 230 A2d 262 (Del, 1967); *aff'd* 395 US 213; 89 S Ct 1677; 23 L Ed 2d 253 (1969). (Where a lessee and defendant are joint occupants, the lessee as the sole legal occupant had superior rights of possession and control and could give consent to a search of the premises including a jointly shared bedroom.)
FLORIDA	*Tomlinson v State*, 129 Fla 658; 176 So 543 (1937). (Search of son's bedroom in father's house with his consent, which resulted in evidence used against child, was lawful.)
IDAHO	*State v Hagan*, 47 Idaho 315; 274 P 628 (1929). (Search of barn on mother's premises with her consent was lawful where defendant's possession of the barn was in subservience and submission to the power, authority, ownership and possession of the mother.)
ILLINOIS	*People v Shambley*, 4 Ill 2d 38; 122 NE2d 172 (1954). (Where a house is jointly owned and occupied by a husband and wife, the wife can in her own right have the police come into the home and search for the weapon the husband had used to assault her. The weapon was found in the garage.)
INDIANA	*Shade v State*, 196 Ind 665; 149 NE 348 (1925). (The owner of land can give permission to police to go onto the land and search for violations of the prohibition law.)
KENTUCKY	*Morris v Commonwealth*, 306 Ky 349; 208 SW2d 58 (1948). (Head of the household or the one in charge of the premises may consent to a search. The evidence was found in the kitchen.)
MAINE	*State v MacKenzie*, 161 Me 123; 210 A2d 24 (1965). (Tenant could consent to a search of

States Supreme Court has considered the matter

	the premises which leads to evidence against the defendant.)
MARYLAND	*McGuire v State*, 200 Md 601; 92 A2d 582 (1952), *cert den* 344 US 928; 73 S Ct 497; 97 L Ed 714 (1953). (Manager of an apartment and lessee of apartment could consent to search in which evidence against defendant was found in the apartment and the defendant was a mere interloper who had no interest in the premises.)
MICHIGAN	*People v Azukauckas*, 241 Mich 182; 216 NW 408 (1927). (The householder could consent to a search of premises he owned. The property seized was not owned by defendant. The barn the property was seized in was not in the exclusive use or possession of defendant.)
MINNESOTA	*State v Kinderman*, 271 Minn 405; 136 NW2d 577 (1965); *cert den* 384 US 909; 86 S Ct 1349; 16 L Ed 2d 361 (1966). (Defendant's father who owned home could consent to search of son's bedroom.)
MISSISSIPPI	*Gordon v State*, 160 So 2d 73 (Miss, 1964). (Stepfather's consent to the search of his premises lawful and the police could enter and seize defendant stepson who was hiding there as well as items of evidence.)
MISSOURI	*State v Anderson*, 384 SW2d 591 (Mo, 1964). (Parent-child consent held right to consent is a personal one to the parent renter of the property.)
NEW YORK	*People v Austin*, 53 Misc 2d 963; 280 NYS2d 433 (1967). (Defendant's mother who owned home where he lived, but didn't pay rent, could consent to a search of the cellar over which he had no exclusive use or control and contraband seized there was admissible against defendant.)
NORTH CAROLINA	*State v Fowler*, 172 NC 905; 90 SE 408 (1916). (Sisters of defendant who were in charge of the premises where defendant also lived could consent to a search of the premises.)
OHIO	*State v Carder*, 9 Ohio St 2d 1; 222 NE2d 620 (1966). (Parent who owns or controls home in which child resides can consent to search of premises.)
OREGON	*State v Broadhurst*, 184 Or 178, 250–251; 196 P2d 407 (1948), *cert den* 337 US 906; 69

of consent to search by some one other than the defendant but a person who has some proprietary interest in the place and sometimes in the object searched or searched for. *Chapman v United States,* 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961); *Stoner v California,* 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964); *Bumper v North Carolina,* 391 US 543; 88 S Ct 1788; 20 L Ed 2d

S Ct 1046; 93 L Ed 1718 (1949). (Relatives to whom owner had given use and occupancy of home could invite in the police to search owner defendant's room.)

PENNSYLVANIA — *Commonwealth v McKenna,* 202 Pa Super 360; 195 A2d 817 (1963). (Defendant's mother may consent to search of premises which she owns and where defendant lives.)

RHODE ISLAND — *State v Cairo,* 74 RI 377; 60 A2d 841 (1948). (Search of cellar used in common by defendant and his wife and owned jointly by defendant and wife could be consented to by the wife.)

TENNESSEE — *McGee v State,* 451 SW2d 709 (Tenn Crim App, 1969). (Joint user of premises may consent to a search. Defendant lived at premises as a member of the family though in fact he was not and the family could consent to the search.)

TEXAS — *Nagel v State,* 126 Tex Crim 265; 71 SW2d 285 (1934). (One who has no right of ownership or control in premises can't complain of search permitted by owner.)

VIRGINIA — *Rees v Commonwealth,* 203 Va 850; 127 SE2d 406 (1962); *cert den* 372 US 964; 83 S Ct 1088; 10 L Ed 2d 128 (1963). (Parents of defendant could consent to a search and gun found in the attic could be used against defendant who did not regularly live in the house.)

WEST VIRGINIA — *State v Plantz,* — W Va —; 180 SE2d 614 (1971). (Search of grandparent's house where defendant had lived temporarily, based on their consent was valid since the grandparents owned and controlled the premises.)

WISCONSIN — *Embry v State,* 46 Wis 2d 151, 159; 174 NW2d 521 (1970). (Two persons with equal rights to use or occupancy of premises may each give consent to a search of the premises.)

797 (1968); *Frazier v Cupp,* 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969).

These four cases along with *Amos, supra,* establish four guidelines, two of which are pertinent in the instant case:

1. If the search is coerced, the search and its fruits are illegal whatever the other circumstances are. *Bumper, supra,* and see also *Amos, supra.*

2. An owner may not give consent to search premises of a tenant unless contractually provided for. *Chapman, supra,* and *Stoner, supra.*

3. An owner may give consent to search of a room in a house which is commonly used and not the part of the house assigned to defendant, particularly if the object of the search is also commonly used. Dicta in *Bumper, supra.*

4. The owner of a house may give consent to search a container (a duffel bag) jointly used by the owner and the defendant and left in the householder's house. *Frazier, supra.*

In *Bumper v North Carolina,* 391 US 543; 88 S Ct 1788; 20 L Ed 2d 797 (1968), the Supreme Court dealt with the problem of a consent given under coercive circumstances. In this case, petitioner lived with his grandmother in a house owned by her. She also owned the rifle that was seized. The Court left no doubt that the grandmother, in the absence of coercion, could have consented to the search. It stated:

> "Mrs. Leath owned both the house and the rifle. The petitioner concedes that her voluntary consent to the search would have been binding upon him. * * * The rifle was used by all members of the household and was found in the common part of the house." 391 US 543, 548, fn 11.

Mr. Justice Black, dissenting, was at least in

agreement that the grandmother could (and *he* thought, in fact *did)* voluntarily consent to the search. He stated:

"Mrs. Leath's voluntary consent was sufficient to validate the search since she owned the house which was searched and the rifle that was taken. It should also be noted that the rifle was not found in petitioner's private room, nor in any part of the house assigned to him, but in the kitchen behind the door." 391 US 543, 556, fn 4.

And in *Frazier v Cupp,* 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969), the Supreme Court discussed the joint right to use. Here the Court held that evidence seized from petitioner's duffel bag was admissible even though consent to search the duffel bag had been given by his cousin Rawls. Justice Marshall stated:

"This duffel bag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. * * * Since Rawls was a joint user of the bag, he clearly had authority to consent to its search. * * * Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside." 394 US 731, 740.[23]

The case at bar does not involve coercion. The wife had freely consented the day before to a search of the house. The two officers who returned on October 12 behaved with perfect courtesy. They did not intimidate the wife into allowing another

[23] The United States Supreme Court in *Coolidge v New Hampshire,* 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971) was again faced with the wife waiver problem, but never reached the issue as they held that there had been no search and seizure within the protection of the Fourth Amendment. *Coolidge* also involved two searches. During the first the husband in the presence of the wife produced three guns. Later to different officers the wife showed four of her husband's guns *without being asked to do so* as Mrs. Chism had been in our case.

exploratory search. Rather, they politely asked for two specific items which had been seen the day before and informed the wife where they could be found.

In the instant case the wife was a joint owner of the house to be searched, a joint occupant as well as a joint owner of the bedroom where the objects seized were to be found and the checks were from a jointly handled checking account in the wife's name alone. Thus, it could be said that defendant "assumed the risk" that his wife would turn over the particular items.[24] Certainly under the rule in *Frazier* and the dicta in *Bumper* the wife could give consent to search, or as actually happened herself pick up and hand over the checks. The

[24] In *Stoner,* the United States Supreme Court stated that Fourth Amendment rights were "not to be eroded by strained applications of the law of agency or by unrealistic doctrines of apparent authority" nor by "'subtle distinctions, developed and refined by the common law * * * .'" 376 US 483, 488. In *Warden v Hayden,* 387 US 294, 304; 87 S Ct 1642; 18 L Ed 2d 782 (1967), the Court in discussing the Fourth Amendment stated:

"We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."

A different thread of reasoning, "assuming the risk" as stated in *Frazier* was followed in the earlier cases of *Lopez v United States,* 373 US 427, 439; 83 S Ct 1381; 10 L Ed 2d 462 (1963) and *Hoffa v United States,* 385 US 293; 87 S Ct 408; 17 L Ed 2d 374 (1966). As the Court stated in *Hoffa:*

"Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." 385 US 293, 302.

And in the dissenting opinion in *Lopez,* as to the matter of misplaced trust, it was said, "It is the kind of risk we necessarily assume * * * ." 373 US 427, 465.

This line of reasoning in *Hoffa* and *Lopez* "remained unaffected by *Katz." United States v White,* 401 US 745, 749; 91 S Ct 1122; 28 L Ed 2d 453 (1971). That is, the theory of a justifiable reliance of privacy, in *Katz v United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), did not preclude situations in which a person relinquished his right of privacy by "assuming the risk" that someone else he had confided in, either in keeping secrets or sharing property, would divulge the secret or property to someone else.

notebook the wife picked up was in the same bedroom and its delivery was covered by the rule in *Frazier* and all of the dicta in *Bumper* except that in the case of the notebook, it is not as clear as in the case of the checks that the notebook was jointly controlled. There is some evidence tending in that direction, and none tending toward exclusive control by the defendant. In any event the rule in *Frazier* does not require that the object searched for be jointly owned. In the dicta in *Bumper* it was merely observed that the object searched for was owned by the householder giving consent, obviously strengthening the case but not necessarily making it critical.

The defendant relies on three Michigan Court of Appeals cases to support his position that his wife could not consent to the second seizure. In *People v Overall,* 7 Mich App 153; 151 NW2d 225 (1967), the Court of Appeals ruled that the grandmother of the defendant who owned the premises where defendant resided could not authorize a search of the bedroom in that home occupied by the defendant. The Court held that the gun barrel seized was not admissible in evidence.

The facts of *Overall* are clearly distinguishable from the instant case in that there the room was exclusively occupied by defendant in *Overall,* whereas in the instant case there was joint occupancy. Likewise in *Overall* there is no question of joint ownership of the objects searched for and seized.

In *People v Smith,* 19 Mich App 359; 172 NW2d 902 (1969), the investigating officers went to the home of the defendant looking for him, were admitted by his brother, also a resident of the apartment, and testified that the brother voluntarily showed them through the apartment, produced a

spent shell from a wastebasket, and on the second visit a few hours later, asked for and received a box of unused shells. Both the spent and unused shells were admitted into evidence. The Court per Justice LEVIN, then a Court of Appeals Judge, in a well reasoned opinion held that the consent was invalid and the seized evidence inadmissible. Then Judge LEVIN analyzed the totality of the situation relying on such factors as 1) the brother was not informed of the purpose of the search; 2) the brother was not advised that he could refuse to permit a search; 3) the coercive atmosphere in which the search took place; 4) the fact that the apartment was defendant's and that he paid the rent and was supporting his brother; and 5) the consent given was not a knowing, freely-given, voluntary consent.

Our case is quite different from *Smith* on the facts. First, the wife had seen the consent signed by the defendant giving permission for a general exploratory search. Since her husband had been jailed on a charge of murder, she knew that the search's purpose would be to find any evidence which might implicate him in the murder. She also had been present at the search the day before. The atmosphere of the seizure was free from coercion and took place in a house which was half-owned by the wife. There is no evidence that she did not consent freely, knowingly and voluntarily to the search on the previous day.

In *People v Flowers,* 23 Mich App 523; 179 NW2d 56 (1970), the Court of Appeals dealt with parental consent to the search of their 17-year-old son's room. The father was advised of the purpose of the search (to find narcotics). There was no coercion, and consent was given. Narcotics were found in the son's bedroom. The son was being supported by the father. The Court found that

though the consent was valid in that there was no coercion and that it was freely and voluntarily given, the father had no personal right to give the consent as he was merely an outsider.

Flowers is distinguishable from the instant case in the same way as *Overall*. A private rather than a shared room was searched. The defendant's property rather than jointly owned property was the object of the search.

Therefore, based on the totality of facts and circumstances, on balance we conclude that the wife could and did consent to get the two items requested by the police and deliver these items to them. She had knowledge from the previous day what the purpose of the search was. She was not coerced in any way. She knew that her husband had signed a waiver. We think her consent was freely, knowingly and voluntarily given. She had joint use and control of the house which extended to the bedroom where the items were found. Further there is no evidence that defendant exercised exclusive control or possession over those items seized on October 12. For a similar conclusion see *Carlton v State,* 111 Fla 777; 149 So 767 (1933); *State v Cairo,* 74 RI 377; 60 A2d 841 (1948); *People v Shambley,* 4 Ill 2d 38; 122 NE2d 172 (1954); and *Embry v State,* 46 Wis 2d 151; 174 NW2d 521 (1970).[35]

[35] In *Carlton*, the police went to defendant's house to further their investigation. Defendant was at home and consented to the search of the house. Defendant was then taken to jail. On the next day the police returned to the home and with the consent of and in the presence of defendant's wife, made a second search. The Florida Supreme Court held that, "[p]iecing the whole procedure together," there was no violation of defendant's search and seizure right. The Court relied on the defendant's consent, the conduct of the police, and the presence and consent of the wife. The Court found that this set of circumstances was not controlled by the general rule that a wife cannot consent to a search of premises owned by her husband without his permission.

C. *Conclusion as to Search and Seizure*

The evidence seized on October 11 and on October 12 was admissible.

V. SUMMARY

There was no denial of the right to speedy trial. The introduction of evidence of previous acts to establish intent was not error, nor was it error by the trial court to fail to give a limiting instruction as to this evidence when none was requested. Last, the evidence seized on October 11 and 12 was admissible. The Court of Appeals is affirmed.

T. M. KAVANAGH, C. J., and T. E. BRENNAN, and SWAINSON, JJ., concurred with WILLIAMS, J.

Our case is even stronger since the wife was a joint owner and user of the house.

In *Cairo*, the Supreme Court of Rhode Island considered the wife consent problem. Here, the wife was a joint owner of the two-family dwelling along with the defendant husband. She gave police her consent to search the home. A search of the cellar, used in common by both families, revealed a bag of tools used in the break-in of the store and three faucets similar to those taken from the store. In upholding this search and seizure, the Court stated the wife could consent in her own right as a joint owner and occupant of the premises. Further, the Court relied on the fact that the evidence was seized in a portion of the house over which defendant did not have exclusive use and control.

In *Shambley*, defendant was convicted of assaulting his wife with a deadly weapon *(i.e.,* a gun). The assault took place in the home jointly owned by defendant and his wife. After defendant's arrest, the wife gave her consent for the officers to search the house for the gun. It was found in the garage. The Court held this evidence admissible following the rule that where two persons have equal rights to the use or occupation of premises, either may give consent to a search and the evidence thus disclosed can be used against either. Again, the wife was acting in her own right and the evidence was found in a part of the house used by both defendant and his wife.

In *Embry* the two defendants had embarked together on a forgery adventure. The Court upheld evidence found in a search of a car and trailer rented by one of the defendants in furtherance of the scheme. This defendant consented to the search. The Court held the evidence admissible against both defendants as they were acting together in this forgery venture and thus had equal rights to use of the car and trailer.

APPENDIX A

[ ] indicate appellate action

1967

10/11 Defendant arrested and incarcerated without bail.

10/18 Defendant petitioned for counsel as indigent—hearing thereon.

10/27 Further hearing on petition for counsel as indigent.

11/16 Preliminary examination with special counsel appointed therefor. Bound over to stand trial for murder.

12/26 Further hearing on petition for counsel as indigent.

1968

1/9 Trial court held defendant not entitled to counsel as indigent.

1/12 Order on above.

1/18 Counsel appointed to appeal 1/12 order denying counsel.

C Ap 2/10 [Counsel filed application for leave to appeal.]

C Ap 3/29 [Leave granted; also leave to Prosecuting Attorneys Association to intervene amicus.]

[Order cutting time for briefs in half.]

[Because Court of Appeals rules against oral argument before October term appellant and prosecutor filed stipulation waiving oral argument.]

C Ap 7/1 [Defendant's appeal counsel filed brief and motion to advance citing incarceration.]

[Prosecutor and Prosecuting Attorneys Association agreed.]

C Ap 7/10 [Court of Appeals denied motion to advance.]

7/24 Prosecutor answered speedy trial motion.

8/19 Prosecutor's answer to speedy trial motion served on defendant.

C Ap 11/13 [Court of Appeals took petition for counsel under advisement.]

1969

4/10 Defendant's speedy trial motion filed 6/20/68 heard 294 days after filing.

4/16 Defendant's speedy trial motion denied.

C Ap 4/23 [Court of Appeals ruled trial court had erred in refusing trial counsel 161 days after case taken under advisement and 297 days after filing motion and stipulation to advance.]

4/25 Trial judge on receipt of Court of Appeals Opinion assigned counsel and gave option for trial in May or August. Assigned counsel opted for latter.

6/19 Defendant's assigned trial counsel moved to quash for denial of speedy trial.

8/18 Trial Court denied motion to quash.

9/19 Defendant moved for immediate trial and case set for October.

10/15 Defendant moved for continuance after trial court granted the Prosecution's motion to endorse additional witnesses on the information.

10/17 Trial Court grants continuance.

1970

1/20 Case comes to trial 27 months after defendant's arrest.

1/30 Defendant convicted of murder in the first degree.

LEVIN, J. *(concurring).* For different reasons, I agree with my colleagues that

—the handwriting specimens seized during the second search of Chism's home were properly obtained and admissible in evidence;

—the evidence tending to show an earlier attempt by Chism on the life of the victim was admissible.

I

First I wish to add some additional observations regarding the speedy trial issue.

As stated in the opinion of the Court, the delay in Chism's trial was caused by the circuit judge's ruling that Chism was not entitled to be represented by a lawyer appointed at state expense and the time consumed in appealing and obtaining a reversal of that ruling.

Legitimate differences of opinion and judgment concerning questions of fact and law are bound to arise in the course of lawsuits. Appellate courts are established to resolve such differences.

Whenever a trial judge errs in ruling on a question that arises before (as here), during or after the trial of a case and the defendant seeks and obtains reversal on appeal and trial or a new trial follows, the delay in the commencement of the trial or the new trial is attributable, in a sense, to the ruling found on appeal to have been erroneous.

Sometimes, albeit infrequently, the trial which ultimately results in a defendant's affirmed conviction occurs many years after the defendant's arrest because of delay attributable to mistrials or new trials granted by the trial judge or, as here, a successful appeal.

Lawyers, judges, trial and appellate, often differ. Such differences and the time required to resolve them through the time consuming appellate process does not deny a defendant a speedy trial.

What then is a reasonable time for an appeal? Interlocutory appeals are heard on leave granted. Leave was granted on March 29, 1968, 28 days after the Court of Appeals received the prosecutor's response to the application for leave to appeal. Chism's brief was filed on May 9 and the prosecutor's on June 6. On July 1, after the Court of Appeals had concluded hearing cases until October, Chism moved for advancement on the calendar. The motion was denied on July 10. In my opinion the motion should have been granted. If it had been granted the case would have been submitted in the early part of October instead of on November 13, and the unnecessary delay of one month would have been avoided.

I am not persuaded by the contention of Chism and of the amicus that the Court of Appeals was constitutionally obliged to hear during the summer recess the appeal which it granted Chism in the exercise of discretion.

The opinion of the Court of Appeals was filed five months and ten days after the cause was submitted. At the time the average disposition time after submission was two–three months.

In summary, the unjustified delay during the interlocutory appeal was perhaps four months. A delay of that length, while unfortunate, is not, in

my opinion, so unreasonable as would justify dismissal of the prosecution, which the United States Supreme Court has recently declared is the only possible remedy. See *Strunk v United States,* 412 US 434; 93 S Ct 2260; 37 L Ed 2d 56 (1973).

II

The opinion of the Court relies on the "totality of facts and circumstances" in upholding the admissibility of the handwriting specimens seized during the second search of Chism's home. The facts that stand out are that Chism authorized "a complete search", this authorization was given on October 11, and the papers seized on the following day during the second search had been identified during the first search conducted on the 11th.

I see no reason to read the authorization as justifying but one visit to the Chism home, particularly where what was taken on the second visit was espied on the first visit and was seized within 30 hours after the authorization to search and seize was signed.

I would limit the authority of a co-owner to authorize a search of jointly-owned property to a case where the person giving the consent is himself under suspicion and so consents in an effort to exculpate himself. This apparently was the case in *Frazier v Cupp,* 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969), as there the consenting co-user of the duffel bag consented to the search at the time of his arrest.

I am guided by the following well-reasoned statement of the United States Supreme Court:

"Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unreal-

istic doctrines of 'apparent authority.' As this Court has said, 'it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical . . . [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime.' *Jones v United States,* 362 US 257, 266–267 [80 S Ct 725; 4 L Ed 2d 697, 705, 706; 78 ALR2d 233 (1960)]." *Stoner v California,* 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964), *rehearing den* 377 US 940; 84 S Ct 1330; 12 L Ed 2d 303 [1964].

III

In a case where it is sought to establish the identity of the murderer with circumstantial evidence,[1] evidence that the person charged as the murderer has threatened the life of the victim clearly would be admissible.[2] On the same principle, evidence is admissible that tends to show a prior attempt to murder the victim by the person charged.[3]

I agree that a failure to instruct on the limited purpose for which other crimes evidence is received is generally not error in the absence of a request to charge.

T. G. KAVANAGH and M. S. COLEMAN, JJ., did not sit in this case.

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[1] *Compare People v Hall,* 19 Mich App 95, 109; 172 NW2d 473 (1969).

[2] *See People v Scott,* 284 Ill 465; 120 NE 553 (1918); *Commonwealth v Moore,* 398 Pa 198; 157 A2d 65; 93 ALR2d 616 (1959); 40 Am Jur 2d, § 316, pp 586–687.

[3] *See Washington v State,* 8 Tex App 377 (1880); 40 Am Jur 2d, § 312, pp 582–583.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

ENOCH D. CHISM, Petitioner v. THEODORE KOEHLER, Individually and as Warden of Marquette Branch Prison, Respondent	# M-74-29CA-2

OPINION

This is a petition for a Writ of Habeas Corpus by Enoch D. Chism who has been convicted of first-degree murder in connection with the death of one Mrs. Nola Puyear. The decedent was killed on August 18, 1967 as she opened a package which had just been delivered to her through the mail. It was an innocent looking package marked "books", but which in fact contained an explosive device. Trial evidence showed that the package had been mailed in Marshall, Michigan and was delivered to Mrs. Puyear at the restaurant owned and operated by her and her husband in that city.

During the police investigation which followed her death, handwriting samples were taken from a number of persons in the community, including the petitioner. As a result of that investigation Enoch Chism was arrested and charged with first-degree murder on October 11, 1967. At the time of his arrest, both petitioner and his wife gave written consent to a search of their home which was conducted at about ten o'clock

that morning. A roll of masking tape, a red marking pencil and a "Fiske" brand "C" battery were seized as a result of that search. These items were admitted at trial in conjunction with expert testimony that they had similarities to fragments found at the explosion site. During the afternoon of the following day, October 12th, two officers returned to the Chism residence and requested Mrs. Chism to turn over certain cancelled checks and a note book which had been seen in the Chisms' bedroom during the search of the previous day. Mrs. Chism did so. Together with the pre-arrest handwriting samples these items were used at trial as evidence that the address label on the bomb package was in the handwriting of Enoch Chism.

As will be set forth below, the trial of this matter did not commence until January 20, 1970, some twenty-seven months after petitioner's arrest, during which time he was continuously incarcerated without bond in the Calhoun County Jail. For more than 15 months of this period he was also without the assistance of counsel.

Petitioner has exhausted his state remedies by appeals to the Michigan Court of Appeals, *People v Chism*, 32 Mich App 610 (1971), as well as the Michigan Supreme Court, *People v Chism*, 390 Mich 104 (1973). His conviction was upheld in both instances.

Two independent grounds are asserted in support of this petition. First, that the twenty-seven month delay between his arrest and trial worked a denial of his constitutional right to a speedy trial. Secondly, that his wife's delivery of the checks and notebook to the police on the day following his arrest violated his right to be free from warrantless searches and seizures. The American Civil Liberties Union of Michigan, as amicus curiae, has briefed and argued this matter in support of the petitioner on the speedy trial issue.

The Search and Seizure Issue.

As set forth briefly above, items were removed from the petitioner's home on two separate occasions, the morning of October 11, 1967, and the afternoon of October 12, 1967. The items taken on October 11th were seized during a consent search immediately following petitioner's arrest. A quantity of cancelled checks and a notebook taken on October 12th were delivered to the police by Mrs. Chism at the request of two of the officers who had participated in the consent search the previous day.

Petitioner claims that the checks and notebook were improperly admitted at trial because, (1) his wife had no authority to consent to a seizure, and (2) his consent to the search of October 11th did not justify the return for items on the following day.

Several facts are especially pertinent. First, the checks and notebook had been seen by a police officer during the search of October 11th. It is clear that there was no actual search on October 12th, but merely a request for these specific items. Second, the home was jointly owned and occupied by Mr. and Mrs. Chism. Third, the items in question were kept in a bedroom shared by petitioner and his wife. Finally, it appears that the checks in question were from an account handled jointly by Mr. and Mrs. Chism.

In view of these facts the case of *McCravy* v *Moore*, (6th Cir. 1973) 476 F2d 281, is dispositive. That case squarely holds that where the wife of an accused, having equal rights of access and occupancy, consents to a search of the premises, there is no violation of the rights of the accused. There, as here, the wife was under no suspicion as a party to the crime, and there was also the factor of animosity between husband and wife which has been pointed out in this case.

It is therefore concluded that the petitioner's Fourth Amendment claim is without merit.

The Speedy Trial Issue.

On October 18, 1967, one week after his arrest, petitioner made application for appointed counsel as an indigent. In considering this request the trial judge conducted hearings on October 18, 27 and December 26, 1967 concerning the defendant's financial condition. During this time counsel was appointed for the limited purpose of a preliminary examination on November 16, 1967 after which the defendant was bound over on the first-degree murder charge.

On January 9, 1968 the trial court ruled against the defendant's request for appointed counsel, but shortly thereafter did appoint counsel for the limited purpose of taking an interlocutory appeal on the question of defendant's right to appointed counsel. Such appeals may be taken to the Michigan Court of Appeals only upon leave granted. On February 10, 1968 the newly appointed counsel filed an application for leave to appeal which was granted on March 29, 1968 together with an order allowing the Prosecuting Attorneys Association of Michigan to intervene as amicus curiae. By order of that same date the Court of Appeals also shortened by one-half the time allowed to all parties for the submission of their briefs. Upon the understanding that the Court would be unable to hear oral arguments until after its summer recess all parties stipulated to submission on briefs. On July 1, 1968 petitioner moved for an advancement on the Court of Appeals' calendar citing his incarceration. Although both the state and amicus stipulated to this motion, it was denied by order of the Court of Appeals on July 10, 1968. The Court offered no explanation for the denial.

During this period the defendant, proceeding in *pro per*,

filed a motion in the trial court on June 20, 1968 seeking dismissal on speedy trial grounds. One month later the prosecutor filed his answer to the motion, buit is was nearly another month before a copy of this answer was served upon the defendant on August 19, 1968. Notwithstanding the nature of the motion and the defendant's circumstances, the trial court did not set this motion for hearing until April 10, 1969. On April 16, 1969, exactly 300 days after filing, the motion was denied.

Despite the waiver of oral argument and the filing of petitioner's reply brief on July 1, 1968, it was not until November 13, 1968 that the Court of Appeals announced that it was then taking the interlocutory appeal under advisement. More than five months later the Court filed its opinion on April 23, 1969. In finding the trial court to have been in error for refusal to grant appointed counsel the Court said in part:

> "At the outset, this Court must affirmatively declare that no one charged with the crime of murder in this State who demands counsel for assistance in his defense may be forced to trial *in propria persona*. We read Am VI of the amendments to the United States Constitution, made applicable to the various States by Am XIV, to mean exactly what it says. Questions relating to financial ability to provide counsel, effect of refusal of a spouse to cooperate in obtaining counsel, deliberate transfer of property to effect indigency, are all subsidiary to the prime principle, i.e., one on trial for murder who wants a lawyer shall have one."
>
> • • •
>
> Defendant Chism is at this moment financially unable to provide counsel for his defense. Whether this resulted from a deliberate transfer of property, his neglect to enforce an equitable property settlement with his wife in the pending divorce case, or his wife's unwillingness to cooperate in obtaining an attorney for his defense, are all beside the point."

People v Chism, 17 Mich App 196, 199

In response to this ruling the trial court made a prompt appointment of counsel and informed him that the matter could be brought on for a jury trial during the following month (May) or in August. Understandably, the newly appointed counsel advised the court that there were certain pre-trial matters he wished to resolve and declined the immediate trial date.

The speedy trial issue was raised for the second time when petitioner's counsel filed a motion to quash the information on June 19, 1969. The trial court heard arguments on the motion July 23rd and ruled against it on August 7, 1969. The case was then set down for trial during the October term but was continued to the January term on defendant's motion after the trial court granted a prosecution motion to endorse a scientific expert on October 15, 1969. Petitioner's trial was finally commenced on January 20, 1970 and after a ten-day trial the jury returned a verdict of guilty as charged.

Petitioner and amicus have both framed their arguments on the speedy trial question within the four factor analysis established by the Supreme Court in *Barker v Wingo*, 407 US 514 (1972). In searching for criteria by which to assess the right, the Court rejected two rigid tests which were urged upon it in that case. The first such proposal would have established a specific time period within which a criminal defendant must be offered a trial date. The second would have established the "demand-waiver" doctrine imposing a prior demand for trial as a strict condition precedent to any con-

sideration of a defendant's later contention that he had been denied his right to a speedy trial.

In rejecting the fixed time proposal the Court was careful to note that it was not disapproving the supervisory rules adopted by various courts establishing a period within which a criminal case must normally be brought to trial. *Barker*, supra, at 530, fn 29. In rejecting the "demand-waiver" proposal the Court pointed to its prior rulings that the waiver of fundamental rights cannot be presumed from the mere inaction of a defendant.

> "This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right is one of the factors to be considered in an inquiry into the deprivation of the right." 407 US at 528.

The Court thus came to its adoption of a balancing test "in which the conduct of both the prosecution and the defendant are weighed." 407 US at 530. Four factors, not intended as exclusive, were identified for application on a case by case basis as: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 US at 530. However, as the Court was careful to point out:

> "We regard none of the four factors identified above as either necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." 407 US at 533.

Length of Delay

The Barker opinion characterized the first factor as a "triggering mechanism". "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." 407 US at 530. In the case at bar respondent admits that the twenty-seven month delay between arrest and trial is sufficient to raise the issue.

Defendant's Assertion of His Right

Respondent has also admitted that petitioner made a timely demand for a speedy trial. The Court finds that concession well founded. It is noted that petitioner proceeded in *pro per* with a motion to dismiss on speedy trial grounds during the pendency of his interlocutory appeal on the question of his right to appointed counsel. It might be argued that petitioner's motion was merely aimed at a possible dismissal and did not necessarily evidence a real desire for an immediate trial. But it would be just as reasonable to infer that his real motive for the dismissal was to cause a reexamination of his case in hopes that the trial court would initiate some action leading to a resolution of his problem of lack of trial counsel.

With the first two factors in this perspective, attention must be focused on the reason for the twenty-seven month delay and the prejudice, if any, suffered by petitioner as result of that delay.

Reason for Delay

When balancing the reason for delay against the other factors,

". . . different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker, supra*, at 531.

Here, as in all cases, the real reason for delay must be identified before it can properly be weighed against the other factors. Respondent lays responsibility for the delay at petitioner's feet. "[T]he petitioner initially caused the problem by voluntarily transferring all his assets to his wife, who was already seeking a divorce, after being charged with first degree murder. The trial court can hardly be faulted for seeking guidance under these circumstances." Respondent's Brief at p. 3. The Court of Appeals took a similar position in holding that, "[T]he flaw in defendant's position, and which is dispositive of the issue, is the fact that the delay was caused by his repeated recourse to the appellate process." 32 Mich App 610, 618 (1971). The Court's use of the word "repeated" cannot be explained since the record clearly shows that the petitioner took only one interlocutory appeal.

Even though the trial court could not have envisioned the extraordinary delay which was to be caused by the interlocutory appeal, a delay of at least five or six months must have been expected. Petitioner insisted that he was without means to pay the $5,000 retainer required by an attorney of whom he had inquired about his defense. It was also quite clear that Mrs. Chism had taken a firm position in refusing to help her husband in any way. In light of the seriousness of the charge and petitioner's non-bailable status, it seems that the trial court should not have put the petitioner to a pre-trial appeal on the

question of his right to appointed counsel. It certainly would have been better to appoint counsel on a conditional basis, as the Court of Appeals finally directed.

On September 19, 1969, petitioner's appointed counsel filed notice that he was ready for trial and demanded an immediate trial date. Trial was then scheduled for the October term. Prior to this, on August 20, 1969, the prosecution had filed a motion to endorse further witnesses including an expert in the field of neutron activation analysis. Over petitioner's objection the trial court granted this late endorsement motion on October 13, 1969. Thereupon the defense immediately asked for a continuance of the trial then set for the following week and moved that a similar expert be appointed at public expense. This motion was granted and the case was then set down for the January term. The prosecution's motion to endorse further witnesses came more than 18 months after the filing of the information. This motion could have been brought and considered at least several months earlier. Thus, the further delay of the trial date from October, 1969 to the following January was highly unreasonable under the circumstances. Responsibility for this delay must be charged against the state.

Of the whole twenty-seven month period, the remaining period to be considered is from July 1, 1968, the date of filing of the last brief in the Court of Appeals, to April 23, 1969, the date of the Court's opinion.

In its consideration of the petitioner's speedy trial claim the Michigan Court of Appeals termed the twenty-seven month delay "lamentable", but failed to acknowledge its own role in that delay. The Court quoted *People v Den Uyl*, 320 Mich 477 (1948) for the proposition that a criminal defendant's right to a speedy trial is "modified" upon the filing of an interlocutory appeal as follows:

> "One of the circumstances which will constitute good cause for delay, again within reasonable limits of time, *is the taking of an appeal,* whether by the State or another party." (emphasis supplied by the Court of Appeals) 32 Mich App 610, 619.

While the quoted language is a correct statement of the law, the proper emphasis must be given to the phrase, "within reasonable limits of time." That is the essence of the balancing test. A criminal defendant cannot be heard to complain about pre-trial delay which is reasonably necessary for a decision on an interlocutory appeal. But this does not mean that his right to speedy trial is modified. The right remains inviolate. In such cases the appellate court shares the affirmative duty of the trial court to bring the pending criminal charges to a reasonably prompt resolution.

In the case at bar the interlocutory appellate delay was far too long. Certainly the Court of Appeals cannot be faulted for any time which elapsed prior to the filing of the appellant's reply brief on July 1, 1968, but at that point in time it became incumbent upon the Court to act with dispatch. It is unclear from the record as to what effect the Court's summer recess had on its work schedule. Whatever the effect, this cannot be assigned as a justifiable reason for delay. Totally aside from the Court's recess there was an inordinate period of more than five months while the case was formally under advisement.

Justice Levin's concurring opinion in *People* v *Chism,* 390 Mich 104, states that the average disposition time for all cases in the Court of Appeals at that time was two to three months. *Id.* at 144. This statement makes no distinction between criminal and civil cases, or between final questions and interlocutory appeals. Given the nature and circumstances of petioner Chism's case, this Court must conclude that the unjustified delay in the Michigan Court of Appeals was at least eight months. Bearing on the weight to be given this factor is the fact that at the time all parties stipulated to an advancement on the appellate calendar, more than eight months had already elapsed since arrest. Regardless of the reasonableness or unreasonableness of this prior delay, the mere passage of that much time made prompt action by the Court of Appeals even more imperative.

Prejudice to the Defendant

The Barker case noted three aspects of the prejudice factor which must be considered in every case.

> "Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." 407 U.S. 514, 532.

Just as none of the four factors of the *Barker* test are indispensible to a finding that the right to speedy trial has been denied, neither are any of these three aspects of the prejudice factor absolutely essential to a finding of prejudice. The obvious importance of the defense impairment aspect can not be allowed to obscure the "personal prejudice" aspects of oppressive incarceration and anxiety generated by a pending criminal charge. This was recognized by the Supreme Court in *United States* v *Marion,* 404 U.S. 307 (1971) where it said:

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or pos-

sible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Id.* at 320.

The case of *United States v Dyson,* (5th Cir. 1972) 469 F2d 735, involved the speedy trial claim of a selective service registrant who had been convicted for failure to report for civilian duty as a conscientious objector. Although the case was decided on the basis of a statute which directed the Justice Department to give such cases priority, the Court considered the case in light of the speedy trial case law saying, ". . . we start with the proposition that the maximum delay permissible under the statute cannot exceed the minimum delay allowed by the constitutional norm." *Id.* at 738. Despite, in the Court's view, an "air-tight" case for the Government, there had been an unexplained pretrial delay of nearly twenty-two months. In assessing the prejudice factor the Court said:

> "It is undisputed that the delay in the present case did not impair the defense, as such, of defendant Dyson. But that is not the sole constitutional norm. *Klopfer,* [382 U.S. 213 (1967)], *Barker,* [407 U.S. 514 (1972)] 'The prophylactic effect of the clause as a protection of the innocent is substantially eroded if the fact of conviction in unimpaired trials removes from appellate consideration the interest of minimizing the consequences of incarceration and public accusation.' Godbold [24 Ala. L.Rev. 265 at 285]. 469 F2d at 741.

It would be difficult to imagine circumstances creating

greater "prejudice to the person" of an accused than did the case at bar. There can be no question that petitioner's incarceration was "oppressive" within the Supreme Courts use of that term. The record portrays a man refused help by his wife and who, without counsel, waited in a county jail for more than fifteen months while the legal system took its time to decide that he should have had counsel in the first place. During this time his case progressed not one inch. It was, as the *Barker* Court termed it, "dead time". If the petitioner wasn't overwhelmed with anxiety and concern in the face of the charge and potential life sentence facing him, then this aspect of prejudice will never be found in any case.

Turning to the question of defense impairment prejudice an issue arises as to the burden of proof. Respondent contends that petitioner has failed to demonstrate any actual prejudice in the preparation of his defense. The Michigan Supreme Court likewise allocated this burden to the petitioner.

> "There is no testimony relevant to prejudice to defendant's defense because of the length of the case such as the loss of witnesses, etc.
>
> • • •
>
> Finally, on the matter of prejudice to defendant because of the length of time before his trial, the most important thing is that there is no evidence that a fair trial was jeopardized by delay . . ." *People v Chism,* 390 Mich 104, 115.

Petitioner and amicus contend that the Michigan Supreme Court misassigned this burden and that it is for the respondent to prove that petitioner was not prejudiced in the preparation of his case. They rely on authority from the Fifth, Seventh and District of Columbia Circuits. *United States v Dyson,*

(5th Cir 1972), 469 F2d 735; *United States v Macino,* (7th Cir. 1973), 486 F2d 750; *United States v Rucker* (D.C. Cir. 1972) 464 F2d 823; *United States v Perry* (D.C. 1973) 353 F.Supp. 1235. Research reveals that the Sixth Circuit has not had occasion to consider the question. After reviewing the above-cited cases, and others on which they rely, this Court believes a fair statement of their holdings on this question is as follows: Upon a showing of excessive and unjustified delay, and some showing by the defendant that there is a *reasonable possibility* that the defense was impaired, the burden then shifts to the state to show that the defendant was not in fact prejudiced by the delay.

In this case the petitioner claims actual defense impairment by (1) loss of memory, (2) deterioration of certain physical evidence and (3) extended denial of counsel which resulted in lost opportunity to investigate and establish possible motive of another person or persons. Petitioner cites several instances of memory loss in the trial transcript. [TR 834, 839, 854, 855, 866]. The cold record gives little insight into whether these lapses were materially detrimental to the defense, but as the *Barker* Court observed "Loss of memory . . . is not always reflected in the record because what is forgotten can rarely be shown." 407 U.S. at 532.

A major factor in the prosecution of this case was the motive ascribed to the petitioner. There was conflicting testimony on whether Mr. Chism had ever directly or indirectly expressed any interest in purchasing the sandwich shop owned by the decedent and her husband. However, the prosecution postulated that an offer by petitioner had been refused and that as a result he resorted to murder. Certainly the passage of time involved in securing counsel may well have obscured the equally plausible motives of others.

During the fifteen months that petitioner was incarcerated

without the assistance of trial counsel, he was without means to effectively marshall his defense. He had no way of locating and interviewing witnesses while their memories were fresh. There was no one to gather and preserve evidence which might have been favorable to the defense. Meanwhile, the State was proceeding in the case with all the investigative expertise and resources at its disposal. Such an imbalance strikes at the very essence of evenhanded criminal justice.

This Court finds that petitioner has made a reasonable showing of possible defense impairment. The respondent has offered no proof that petitioner was not actually prejudiced in his defense and therefore this factor must be weighed in favor of petitioner.

By all of the foregoing, this Court has endeavored to methodically and fairly analyze this case within the guidelines set down by the Supreme Court in *Barker*. After so doing it must be concluded that petitioner Enoch Chism was denied his Sixth Amendment right to speedy trial by the State of Michigan. Viewed piecemeal some of the delays can be seen as reasonable, but viewed in the aggregate they constitute an excessive amount of time. In testing a speedy trial claim the broad perspective must be taken. A series of "reasonable" delays become increasingly less reasonable when allowed to cumulate. In the final analysis, the overriding factors in this case were the inordinate delay on the interlocutory appeal and the prejudice caused by petitioner's lack of counsel during that time. These factors alone would support a conclusion that the right was denied.

In light of this conclusion the remedy is absolute. The petition for Writ of Habeas Corpus must be granted. *Strunck v. United States,* 412 U.S. 434 (1972).

An appropriate order may be submitted.

RALPH M. FREEMAN /s/
RALPH M. FREEMAN
United States District Judge

Dated: April 18th, 1975.

TO: Peter H. Shumar
151 Rock Street
Marquette, Michigan 49855

For Petitioner

William S. Easton
A.C.L.U.
P.O. Box 521
Marquette, Michigan 49855

Amicus Curiae

Joel M. Shere
A.C.L.U.
808 Washington Boulevard Building
Detroit, Michigan 48226

Amicus Curiae

Frank J. Kelley
Attorney General
Patrick O. Landy
Assistant Attorney General
525 West Ottawa
Lansing, Michigan 48913

For Respondent

TO BE PUBLISHED

NO. 75-1989
NO. 75-1990

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JAN 14 1976

JOHN P. HEHMAN, Clerk

ENOCH CHISM Petitioner-Appellee v. THEODORE KOEHLER Respondent-Appellant	ORDER

BEFORE: WEICK, Circuit Judge; HONORABLE HOWARD T. MARKEY,* Chief Judge, U.S. Court of Customs and Patent Appeals; and LIVELY, Circuit Judge.

Upon careful consideration of the record before the court together with the briefs and oral arguments of counsel the court concludes that the district court did not err in granting the petition for a writ of habeas corpus in this action. Accordingly, the judgment of the district court is affirmed on the basis of

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*Sitting by designation

the opinion of Senior United States District Judge Ralph M. Freeman reported at 392 F. Supp. 659 (E.D. Mich. 1975).

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN /s/
Clerk

MOTION FILED

MAR 18 1976

IN THE SUPREME COURT OF THE UNITED STATES

(District Court Civil No. M-74-29CA-2 — Sixth Circuit Court of Appeals Case Nos. 75-1989 and 75-1990)

THEODORE KOEHLER,

Petitioner-Appellant,

vs.

Supreme Court
No. 75-1292

ENOCH CHISM,

Respondent-Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

PEOPLE OF THE STATE OF MICHIGAN

JOHN J. RAE (P 19188)

Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

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RELIEF 12

IN THE SUPREME COURT OF THE UNITED STATES

(District Court Civil No. M-74-29CA-2 — Sixth Circuit Court of Appeals Case Nos. 75-1989 and 75-1990)

THEODORE KOEHLER,
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vs.

Supreme Court No. .....

ENOCH CHISM.
Respondent-Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NOW COME the People of the State of Michigan, by and through the Office of the Calhoun County Prosecuting Attorney, and move this Honorable Court for Leave to File an Amicus Curiae Brief in the above-entitled cause for the following reasons:

1. A number of Amici have been granted permission at various times to file pleadings in this cause in both the state and federal proceedings in recognition of the vital interests and issues involved herein.

2. The People of Calhoun County, Michigan, where this heinous criminal offense was committed have a deep and abiding interest in seeing that the ends of justice are met in this case because of the obvious danger this offense presented to scores of people in Calhoun County and the potential of further danger should the Respondent-Appellee be released.

3. The Prosecuting Attorneys' Association of Michigan is an authorized and official representative of the Pros-

ecuting Attorneys of the State of Michigan, all of whom have an interest in the principles and outcome of this cause but, because of a budgetary cutback in the current fiscal year, said Association is unable to continue in an active role in the furtherance of this case, and, under these circumstances, it is urgently requested that the interests of the people of Calhoun County continue to be vigorously represented by counsel, who, while not in office at the time of the Chism trial, were and are intimately acquainted with the genesis and aftermath of that case.

4. Calhoun County is the county of trial jurisdiction and venue in the state criminal proceeding from which this cause arose, and, as the present chief law enforcement officer and prosecutor for that county, John J. Rae has ultimate responsibility for the trial and conviction of Enoch Chism.

5. The interest of, and presentations of, the Attorney General of the State of Michigan, while parallel, are not and cannot be so identical as to make an Amicus Brief in this cause redundant.

6. The issue presented in the instant case involves an important application of the constitutional guarantees of the right of an accused to a speedy trial and due process of law, and the movant believes himself capable of rendering valuable assistance to this Court in resolving these questions.

7. Your movant further prays this Honorable Court grant him an opportunity for oral argument in this cause. A proper and thorough oral presentation to the Court by one who is familiar with all of the positions and interests at stake including a thorough familiarity with the background of facts as is your movant in this case is essential to a just and conclusive determination of the issues.

8. The Brief Amicus Curiae is delivered to this Honorable Court along with this Motion.

WHEREFORE, the People of the State of Michigan, by the Office of the Calhoun County Prosecuting Attorney,

move this Honorable Court to grant its Motion for Leave to File an Amicus Curiae Brief in this cause and further grant it an opportunity for oral argument herein.

Respectfully submitted,

(s) John J. Rae
Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

Dated: March 8, 1976

AFFIDAVIT

STATE OF MICHIGAN
ss.
COUNTY OF CALHOUN

John J. Rae, being first duly sworn, deposes and says that he has read the foregoing, and it is true to the best of his knowledge and belief.

(s) John J. Rae
Calhoun County Prosecuting Attorney

Subscribed and sworn to before me this 8th day of March, 1976.

(s) Martha E. Williams
Notary Public, Calhoun County, Michigan
My commission expires: June 14, 1976

IN THE SUPREME COURT OF THE UNITED STATES

(District Court Civil No. M-74-29CA-2 — Sixth Circuit Court of Appeals Case Nos. 75-1989 and 75-1990)

THEODORE KOEHLER,

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ENOCH CHISM,

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PEOPLE OF THE STATE OF MICHIGAN

JOHN J. RAE (P 19188)

Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

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ARGUMENT

THE DISTRICT COURT AS UPHELD BY THE COURT OF APPEALS IMPROPERLY APPLIED THE BALANCING TEST FOR A SPEEDY TRIAL CLAIM MANDATED BY *BARKER* v *WINGO* AND ERRED IN GRANTING RESPONDENT HABEAS CORPUS RELIEF.

At issue here is the re-application of the speedy trial standards of *Barker* v *Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101, 117 (1972), to the Michigan Supreme Court decision in *People* v *Chism*, 390 Mich 104; 211 NW2d 193 (1973), by a Federal District Court Judge on a petition for habeas corpus. Appellant submits that in attempting to justly balance the criteria for determining a speedy trial claim first laid down in *Barker*, and religiously and scrupulously followed by the Michigan Supreme Court in *Chism*, the district judge has erred.

The gist of the *Barker* formulations is indisputable:

> We can do little more than identify some of the factors which courts should assess on determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. (footnote omitted). 407 US 530; 33 L Ed 2d at 117.

The Court itself in its decision recognized that these criteria were not immutable and rigid totems whose intransigence should be allowed to thwart justice in a particular case, but rather symbols of the proper interplay between the interstices and interfaces of the concept of speedy trial. The concurring opinion of Justice Brennan in *Dickey* v *Florida*, 398 US 30, 47; 90 S Ct 1564; 26 L Ed 2d, 37-38 (1970), pointed out how these factors are to be balanced:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the find-

ing of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. *Barker,* 407 US at 533; 33 L Ed 2d at 118.

They do not stand alone but must be understood in light of the few, but pertinent cases which anteceded them, particularly, *United States* v *Ewell,* 383 US 116; 15 L Ed 2d 627; 86 S Ct 773 (1966), *Klopfer* v *North Carolina,* 386 US 213; 18 L Ed 2d 1; 87 S Ct 988 (1967), and *Dickey* v *Florida, supra.*

Of particular interest must be Justice Brennan's concurrence in *Dickey* v *Florida, supra,* 398 US 51-52; 26 L Ed 2d 40, and specifically this observation:

> When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. *Pollard* v *United States, supra,* at 361, 1 L Ed 2d at 399. See also *United States* v *Provoo, supra.* The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interest protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided — whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of reason for the delay, and, on the other hand, the length of the delay and its potential for prejudice to interests protected by the speedy trial safeguard . . .

Looking then to the application of these principles in the district court's opinion, we find not only a misapprehension as to the appropriate criteria, but an unconstitutionally over-weighing of some principles against the others.

Length of Delay

Appellant submits that there are two possible approaches to the computation of a length of delay: (1) actual total time period, arrest to trial, with appropriate consideration of that delay *in light* of the other criteria; (2) application of other criteria, particularly *cause* for delay, to the time period to reduce it to that period properly attributable to the prosecution and then application of a presumption of prejudice from such delay, *People* v *Chism, supra,* 144-145, Levin J., concurring. While *Amicus* is probably bound by the petitioner-appellant's record admission as to an apparent or surface appearance of an unreasonable delay as to the use of the first criteria, and deal with the district court's application thereof, it submits such an absolute test was not mandated by *Barker* and is improper in light of the court's specific command to strike a balance.[1] The use of the second formulation results in concentration on whether the *actually* attributable "down time" from arrest

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[1] The majority computation of time in *People* v *Chism, supra,* at 112-113 was an amalgam of the two tests postulated: The times break down to: 3 months in the trial court on the issue of indigency, including hearings, etc., prior to appeal and 9 months subsequent to appeal, of which 7 months were specifically to meet defendant's and his counsel's convenience, and were not properly the responsibility of either prosecutor, or trial court. Under "test 2", the period chargeable to the state is at most 16½ months. *Barker,* itself, seems to adopt the second approach in action, 407 US at 533-534; 33 L Ed 2d at 119. See also *United States* v *Rosenbloom,* 511 F2d 777 (CADC, 1974) refusing to include the time spent upon a successful interlocutory appeal by the prosecution in the speedy trial calculation, and *United States* v *Roemer,* 17 CrL 2088 2089, (CA 2, 4/8/75).

to prosecution is minimally sufficient to raise the issue. Under either analysis it is not so clear the time period examined herein was so presumptively prejudicial as to necesitate inquiry into the other factors.

Moreover, the Honorable Judge Freeman erred in using the time lapse *only* as a condition preeedent to further inquiry, (Op, p 7). While he evaluates the time period in light of the reasons for the delay, he fails to also balance the time period *against* the other criteria in the manner envisioned by the Court in *Barker*:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge. 407 US at 530-531, 33 L Ed 2d at 117.

Thus, we have reversal for a 27 month delay when courts have upheld delays of 56 months, *Turner* v *Estelle*, 515 F2d 853 (CA 5, 7/9/75), *United States* v *Roemer*, 17 CrL 2088-2089 (CA 2, 4/8/75), 60 months, *Barker* v *Wingo, supra*, 21 months, and *United States* v *Shepherd*, 511 F2d 119 (1975).

Assertion of Right

Once again the court's opinion stops short of the required balancing of *Barker, supra*. It is not the fact of demand alone which must be considered, but the nature and insistence thereof:

> We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength

> of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived the right. 407 US at 531-532; 33 L Ed 2d at 117.

See also, *United States* v *Shepherd*, 511 F2d 119; 122-123 (CA 5, 1975), *United States* v *Latimer*, 571 F2d 498, 501 (CA 10, 1975).

Thus, the energy, spacing, and timing of the two ostensible demands must be considered against the backdrop of the factual tapestry in which they occurred. Viewed against this background it is not so clear that the defendant was so convinced of possible prejudice and desirous of trial as to alone justify penalizing the State of Michigan for granting him interlocutory review of an important issue. In fact, the defendant's activities in transferring his assets shortly after arrest strongly argue that the defendant was attempting to create as many roadblocks as possible to a successful prosecution of the case pending against him.

Prejudice to the Defendant

The district court relied upon *United States* v *Dyson*, 469 F2d 735 (CA 5, 1972), *United States* v *Macino*, 486 F2d 750 (CA 7, 1973), *United States* v *Rucker*, 464 F2d 823 (CADC, 1972), and *United States* v *Perry*, 353 F Supp 1235 (DC, 1973), and has apparently placed upon petitioner the burden of showing that respondent was not, in fact, prejudiced in the preparation of his defense by the delay in bringing him to trial. The Michigan Supreme Court had this to say on the issue:

> There is no testimony relevant to prejudice to defendant's defense because of the length of the case such as loss of witnesses, etc.

> In sum, defendant suffered considerable personal deprivation by long incarceration, but it cannot be said that his ability to defend himself was in any significant way prejudiced. *People* v *Chism, supra,* at 115.

In *United States* v *Roemer,* 17 CrL 2088, 2090 (CA 2, 4/8/75), the Second Circuit ruled that *Barker* requires an actual showing of real prejudice on the part of the defendant:

> Thus, the appellant contends that "some degree of prejudice should be presumed," but plainly the balancing test in *Barker* v *Wingo,* contemplates a showing of actual prejudice (Text).

See also *United States* v *Latimer, supra,* 502, and *United States* v *Baumgartner,* 17 CrL 2145, 2146 (CA 8, 5/1/75).

Reliance upon *United States* v *Dyson,* 469 F2d 735 (CA 5, 1972), is particularly suspect in light of *Turner* v *Estelle,* 515 F2d 853 (CA 5, 7/9/75), wherein the same Court of Appeals rejects defendant's claims of prejudice because of his failure to demonstrate the "prejudice" would have led to a different result. See also *United States* v *Shepherd,* 511 F2d 119, 123-124 (CA 5, 1975), where the defendant's attempt to prove prejudice from delay was not persuasive.

Reliance upon *United States* v *Macino,* 486 F2d 750 (CA 7, 1973), is also suspect in light of *United States* v *Calhoun,* 510 F2d 861, 865 (1975):

> No prejudice to defendant was claimed *or proved.* (emphasis added).
>
> • • •
>
> Further, there was *no proof* any witness was lost to defendant, or that any witness sought might testify favorably to him.[2] (footnote omitted, emphasis added.)

A meticulous reading of *United States* v *Rucker,* 464 F2d 823, 825 (CADC, 1972), reveals that the burden placed upon the prosecution is not to disprove a claim of prejudice, but

rather the burden of *justifying* attributable delay. (*Rucker* was decided in June of 1972, and makes no mention of, or use of, the contemporaneously decided *Barker.*)

Finally, it is incorrect that Courts have given *no* indication of their views as to the burden of showing some actual prejudice. See *United States* v *Franks,* 511 F2d 25, 37 (CA 6, 1975) and *Trigg* v *State,* 507 F2d 949 (CA 6, 1974).

Nor is a finding of some actual prejudice to the defense the end of the inquiry. There is prejudice and there is prejudice. The nature of the prejudice, and its importance or significance to the preservation and presentation of the defense must be balanced and weighed in the scales constructed by *Barker.* There has never been any indication, even now, that the residue of physical evidence within the exhibit bottle was, or is, insufficient for a valid analysis, nor any indication of a possible reason to suspect any fault, error, or contrivance in the State's analysis of the contents as lye.

As to defendant's alleged loss of memory — while this problem affects and prejudices all witnesses in a criminal case, the petitioner was in a unique and unusual position to protest against just this harm. While *other* witnesses might be lost to the defense through defendant's incarceration or their loss of memory, the petitioner had instant access to, and good reason to protect, his own recollections surrounding the times, places and actions in controversy. On balance, the alleged prejudice claimed herein was insufficient to support a finding of denial of the constitutional right to a speedy trial.

Reason for Delay

It is here, more than anywhere else, that *Amicus* must take issue with the findings and rulings of the district court. When one couples the court's conclusion (Op, p 14), with his earlier discussion of, and the reason for, and blame of the appellate process for, the delay in bringing the defendant to trial, the result is a rule that if a defendant, through counsel (and it should be pointed out appointed counsel), can file a sufficient number of interlocutory appeals, each to be dispatched by the appellate

courts, he can on his own create a total period so lengthy as to deny himself a speedy trial.

But how is it that recourse to the appellate courts on interlocutory appeal can have this effect? Particularly when the appeal is for the defendant's benefit and presents a critical issue for determination. Did not the United States Supreme Court opine:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. *Barker,* 407 US at 531; 33 L Ed 2d at 117.

and:

> However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." *Beavers* v *Haubert,* 198 US 77, 87; 49 L Ed 950, 954; 25 S Ct 573. "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . The delay must not be purposeful or oppressive," *Pollard* v *United States,* 352 US 354, 361; 1 L Ed 2d 393,

> 399; 77 S Ct 481. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v *United States,* 360 US 1, 10; 3 L Ed 2d 1041, 1048; 79 S Ct 991. *United States* v *Ewell, supra,* 383 US at 120; 15 L Ed 2d at 630-631 (1975).

See also, *United States* v *Rosenbloom,* 511 F2d 777 (CADC, 1974), rehearing den en banc, 511 F2d 784 (1975). *United States* v *Shepherd, supra,* 122:

> Under *Barker,* neutral factors causing the delay are to be weighed less heavily against the government than an attempt by the government to prejudice the defense by delay. It is undisputed that the delay in this case resulted from the action or inaction of the district court rather than from any action, much less misconduct, of the prosecution. We therefore assign little weight to this factor in assessing the Shepherd's claim.

Considered in its proper setting, this appeal came to a still fledgling appellate court before *Barker* had been decided at a time when it was struggling out from under the problems of its birth and an inundation of criminal appeals (two "visiting" judges sat on the appeal). It presented a critical issue under both the United States, Amend VI, and Michigan, CONST 1963, Art I, Sec 20, Constitutions; and under *Gideon* v *Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 789 (1963), trial judges were offered little guidance in resolving this question. Because the right to *appointed* counsel only applied to *indigents* in the criminal justice system the question of how to determine indigency, or whether a defendant could create "anticipatory indigency" was a vital and complex one. The Court of Appeals' final treatment of, and resolution of, the matter and the length of time that Court took to determine this issue of first impression in Michigan is no indication that long and hard thought and anguish did not go into the opinion, or that a more expeditious handling of the case was possible.

Legitimate differences of opinion and judgment concerning questions of fact and law are bound to arise in the course of lawsuits. Appellate courts are established to resolve such differences.

Whenever a trial judge errs in ruling on a question that arises before (as here), during or after the trial of a case and the defendant seeks and obtains reversal on appeal and trial or a new trial follows, the delay in the commencement of the trial or the new trial is attributable, in a sense, to the ruling found on appeal to have been erroneous.

Sometimes, albeit infrequently, the trial which ultimately results in a defendant's affirmed conviction occurs many years after the defendant's arrest because of delay attributable to mistrials or new trials granted by the trial judge or, as here, a successful appeal.

Lawyers, judges, trial and appellate, often differ. Such differences and the time required to resolve them through the time consuming appellate process does not deny a defendant a speedy trial. *People* v *Chism, supra*, at 143-44. Levin J., concurring.

The issue here then is not crowded dockets, etc., or prosecutorial effort to deliberately postpone the trial, *United States* v *Drummond*, 511 F2d 1049, 1054 (CA 2, 1975), but the orderly expedition of an effort to insure the rights of the accused. In fact, and as the record in this case clearly shows, both the prosecution and defense agreed to cut in half the time for the normal filing of the interlocutory appeal and, in fact, did so. The proper and considered movement of the law should not be derailed to expedite the bringing of a criminal case to trial helter-skelter. Thus, in *Turner* v *Estelle, supra*, the Fifth Circuit, relying upon *Arrant* v *Wainwright*, 462 F2d 677 (CA 5, 1972) held that it was a valid and justifiable reason for delay of trial, i.e., a period not chargeable to the State of Texas, to await outcome of the defendant's pending trial on a capital offense:

> If a delay to enable the prosecution to locate witnesses and accumulate evidence is valid, it is also valid for the state to wait until it is clear that the expense, inconvenience to witnesses and jurors, burden on prosecutorial and judicial resources, and vexation to the defendant that a trial inevitably causes will in fact be necessary . . . Within ten months of the time at which it became clear a trial would be necessary, petitioner was brought to trial. We conclude that this factor weighs heavily against finding a denial of Turner's right to a speedy trial. 17 CrL 2335.

Delay has been recognized as prejudicial to the State's case as well, *Barker, supra*, 407 US 521-522; 33 L Ed 2d 111-112. The district court unfairly blames and punishes the State for the defense-requested delay in the granting of the motion to endorse an expert witness. Yet defense counsel knew beforehand of the endorsement, and indicated a readiness for trial while the motion was pending decision. With no reason to doubt either the expertise of, or suspect bias on the part of, this expert, the defendant chose to request a delay of the trial — such time period should *not* have been weighed against the prosecution, for as the Supreme Court observed in another context:

> Certainly it is clear beyond question that the double jeopardy clause does not guarantee a defendant that the government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. . . . The determination to allow reprosecution in these circumstances reflects the judgment that the defendant's double jeopardy interest, however defined, do not go so far as to compel society to so mobilize its decision making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error. *United States* v *Jorn*, 400 US 470, 483-484; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Conclusion

The district court applied and considered each of the *Barker* tests independently and failed to properly evaluate them in the balancing concept demanded by *Barker* itself. He improperly placed the burden of going forward on the issue of prejudice upon the petitioner, and failed to properly evaluate the reason for and effect of the delay. In so doing, it was inevitable that he would come to an incorrect decision on the merits of respondent's speedy trial claim. The petition for habeas corpus should have been denied.

RELIEF

WHEREFORE, the Amicus Curiae on this Brief requests this Court rule upon the appeal herein as it deems justice and the law requires.

Respectfully submitted,

JOHN J. RAE (P 19188)

Calhoun County Prosecuting Attorney
228 County Building
Marshall, Michigan 49068

Dated: March 8, 1976

Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1292

THEODORE KOEHLER, Warden,
Marquette Branch Prison,

Petitioner-Appellant,

vs.

ENOCH CHISM,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Patrick O. Landy
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Thomas L. Casey
Assistant Attorney General

Attorneys for Petitioner-Appellant

Business Address:
760 Law Building
525 West Ottawa
Lansing, Michigan 48913

DATED: May 4, 1976

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 19, 1976, and (2) granting the petition. As grounds for this motion, Petitioner states the following:

1. THE VIOLATION BY THE LOWER COURTS OF THE AD HOC BALANCING PRINCIPLE OF BARKER V WINGO, 407 US 514 (1972), THROUGH THE USE OF A PER SE SPECIFIED TIME PERIOD TEST AND THE FAILURE TO PROPERLY CONSIDER THE REASON FOR THE DELAY.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Western District of Michigan which granted the petition for a writ of habeas corpus. *Chism* v *Koehler*, 392 F Supp 659 (WD Mich, 1975), *aff'd* ..... F2d ..... (CA 6, 1976). That judgment, while paying lip service to the ad hoc balancing principle enunciated in *Barker* v *Wingo*, 407 US 514 (1972), in fact applied a per se specified period of time test in determining that the right to a speedy trial had been violated. Instead of fairly analyzing the four *Barker* factors along with all other relevant circumstances, the court arbitrarily and improperly gave undue weight to the factors of prejudice (this issue is discussed in the petition for a writ of certiorari) and length of delay, and failed to give proper consideration to the reason for the delay. The court incorrectly held that the "inordinate delay on the interlocutory appeal" and the prejudice were "overriding factors" which "*alone* would support a conclusion that the right was denied." (emphasis added) 392 F Supp at 668.

The court determined that "regardless of the reasonableness or unreasonableness" of pre-appeal delay, the "mere passage" of such time made a prompt appellate decision necessary. While admitting that a delay "of at least five or six months must have been expected," the court merely found that the "unjustified delay in the Michigan Court of Appeals was at least eight months." This use of a per se time period is an improper application of the *Barker* v *Wingo* balancing test and fails to give proper consideration to the reasons for the delay of the state trial.

Shortly after his arrest for the mail bomb murder of Mrs. Nola Puyear, Respondent Chism intentionally divested himself of his jointly-held assets in the hope of convincing the trial court that he was eligible for court-appointed counsel. Thus confronted with a novel issue involving potentially far-

reaching consequences for the entire judicial system, the trial court held extensive hearings and then refused to appoint an attorney for Chism at public expense. Because of this unique situation which Chism himself had created, the trial court permitted an interlocutory appeal to the Michigan Court of Appeals which, while resolving the issue in Chism's favor, took an unfortunately long time. There has been no contention that the prosecution was in any way at fault in this delay, and in fact, the government did everything it could to expedite the appeal by stipulating to submission on briefs alone and by stipulating to advancing the case on the Michigan Court of Appeals calendar.

Despite the prosecution's good faith and despite other relevant circumstances such as the heinous nature of the crime and the overwhelming evidence of Chism's guilt, the United States Court of Appeals agreed with the District Court that the Michigan trial court should have presaged the appellate decision which granted Chism's request for appointed counsel. Although this question of self-induced indigency was one of first impression in the state courts in 1967, the 1975 order granting the writ of habeas corpus determined that "the trial court should not have put the petitioner to a pre-trial appeal. . . ." In hindsight it appears that a better course would have been to grant appointed counsel earlier, but to elevate such a retrospective determination to the status of a constitutional mandate is unreasonable.

Administrative delays in criminal trials admittedly must be weighed against the government in determining whether the constitutional right to a speedy trial has been violated, but the courts are virtually unanimous in declaring such delays to be "neutral reasons" which "should be weighed less heavily." *Barker* v *Wingo*, 407 US 514, 531. This is true of the several circuit courts, *see e.g.*, *United States* v *Shepard*, 511 F2d 119 (CA 5, 1975); *United States* v *Jones*, 524 F2d 834

(CA DC, 1975); *United States* v *Baumgarten*, 517 F2d 1020 (CA 8, 1975), *cert den* ..... US .....; 96 S Ct 152; ..... L Ed 2d ..... (1975), and it is also true within the Sixth Circuit, *see e.g., United States* v *LaBorde*, 496 F2d 965 (CA 6, 1974), and *United States* v *Mulligan*, 520 F2d 1327, 1331, 1332 (CA 6, 1975), where it was said that time alone does not require dismissal of an indictment and that "court-created delay" did not abridge that defendant's constitutional right to a speedy trial. These decisions are in clear conflict with the holding in this case, where administrative delay was held to be an "overriding factor" in the decision to grant the writ.

Also in conflict with the instant case is the recent holding in *United States* v *Fairchild*, 526 F2d 185 (CA 7, 1975), *cert den* ..... US ..... (Case No. 75-1033, April 19, 1976). It should be noted that certiorari was denied on the same day in *Fairchild* and in the instant case. In *Fairchild* a twenty-seven month delay between indictment and trial was held not to deprive the defendant of his right to a speedy trial although the only explanation for the delay was that the government desired to find others who were involved in the counterfeiting operation and it wanted to conclude the separate trial of a witness. The *Fairchild* court cited with approval the decision in *United States* v *Ricketson*, 498 F2d 367, 371-372 (CA 7, 1974), where the court *assumed* that the trial judge had sufficient reasons for postponing the trial and held that the defendant had not sustained his burden of showing why those reasons were insufficient.

Most of the cases which discuss the issue of "neutral factors" deal with delays in trial courts such as overcrowded dockets; few cases have considered delays caused by a defendant's interlocutory appeal. However, in *Harrison* v *United States*, 392 US 219, 221, fn 4 (1968), this Court said:

> "4. • • •
>
> "The petitioner's further contention that he was denied the right to a speedy trial is wholly without merit and was properly rejected by the Court of Appeals. See 128 US App DC, 248-250, 387 F2d, at 206-208. • • • Virtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of the petitioner or from the need to assure careful review of an unusually complex case."

With the ever-increasing caseload in the state trial and appellate courts, it can reasonably be expected that the problem of delay caused by appellate review will recur with greater frequency in coming years. If the *Barker* v *Wingo* balancing test is to be modified so that such appellate delay will be weighed heavily against the government as a per se violation of the right to a speedy trial, let the change come only after careful and complete consideration of the issue by this Court. To allow a single aberrant District Court judgment, as affirmed by a single Circuit Court panel, to arbitrarily impose such a limitation would be too drastic a method of solving such an important problem.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Patrick O. Landy
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Thomas L. Casey
Assistant Attorney General

Attorneys for Petitioner-Appellant

Business Address:

760 Law Building
525 West Ottawa
Lansing, Michigan 48913

Dated: May 4, 1976